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No. 04-___

In The

Supreme Court of the United States

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE; SHOSHONE-BANNOCK TRIBES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Idaho statutes impose a motor fuels tax "upon the receipt of motor fuel in this state by any distributor receiving motor fuel upon which the tax imposed by this section has not previously been paid." Idaho Code § 63-2402 (Michie Supp. 2004). At the time that this provision was enacted, the state legislature expressly declared that the tax's legal incidence falls upon distributors. 2002 Idaho Sess. Laws ch. 174, § 1. Section 10 of the Hayden-Cartwright Act, Act of June 16, 1936, ch. 582, 49 Stat. 1519, 1521 (codified as amended at 4 U.S.C. § 104), provides in part that "[a]ll taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or the use of gasoline or other motor fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States." The following questions are presented:

I. Where a state legislature expressly allocates legal incidence of a motor fuels tax to the distributor of such fuel, may a federal court nonetheless deem such incidence to be borne by retailers?

II. Does the term "United States military or other reservations" in section 10 of the Hayden-Cartwright Act encompass Indian reservations?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Duwayne D. Hammond, Jr., Coleen Grant, Larry Watson and Severina Sam Haws, in their official capacities as Commissioners of the Idaho State Tax Commission, hereby petition for issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 384 F.3d 674 and reproduced at App. 1-46. The opinion of the United States District Court for the District of Idaho, as amended, is reported at 224 F. Supp. 2d 1264 and reproduced at App. 47-61.

JURISDICTION

The opinion and judgment of the court of appeals were entered on August 19, 2004. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

1. Section 104 of title 4, United States Code, is reproduced at App. 62.

2. Relevant provisions of the Idaho Motor Fuels Tax, Idaho Code §§ 63-2401 to –2443 (Michie 2000 and Supp. 2004) are reproduced at App. 63-97.

3. Relevant rules of the Idaho State Tax Commission are reproduced at App. 98-131.

STATEMENT

In Indian law and other tax cases, a threshold issue is whom the legislative branch has designated as the taxpayer. This Court endorsed in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the position taken by 11 *amici curiae* States that, for purposes of resolving the "taxpayer" issue, legal incidence provides "'a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority.'" *Id.* at 459. That position, importantly, was taken in *opposition* to the request by the Oklahoma Tax Commission – in whose support generally the States' *amicus* brief was filed – that the Court replace the legal incidence test with "a more venturesome approach" based on "'economic reality'" – *i.e.*, divining which person bears the challenged tax's practical burden under ordinary business practices. *Id.* at 460. The first question presented here is whether the Idaho legislature properly invoked the benefit of the "bright-line" standard by expressly and unequivocally imposing the legal incidence of its motor fuels tax on distributors. This question is significant not only in the specific context of a fuel tax but also for the full range of excise and sales taxes whose economic burden typically is passed down through the distribution chain and where the "bright-line" rule espoused by *Chickasaw Nation* has particular relevance for tax administrators.

While, in petitioners' view, *Chickasaw* answered the first question presented, it explicitly declined to address the second question – whether section 10 of the Hayden-Cartwright Act, Act of June 16, 1936, ch. 582, 49 Stat. 1519, 1521 (codified as amended at 4 U.S.C. § 104) ("Hayden-Cartwright Act"), applies to Indian reservations. *See Chickasaw Nation*, 515 U.S. at 456-57. The Act's applicability has plain importance to States because, at the least, it would obviate the preemptive impact under federal common law of imposing a fuel tax's legal incidence on tribes or their members with respect to on-reservation transactions. If applicable, the statute also would have an impact on the interest-balancing preemption analysis that presently governs the ability of States to tax reservation transactions involving tribes or their members and non-members. *E.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980).

I. IDAHO MOTOR FUELS TAX

Under its motor fuels tax statute as amended in 2002 (2002 Idaho Sess. Laws ch. 174 (56th Leg.) ("Chapter 174") (App. 132)), Idaho imposes a 25 cents per-gallon tax "upon the receipt of motor fuel in this state by any distributor receiving motor fuel upon which the tax imposed by this section has not previously been paid" (Idaho Code § 63-2402(1) (Michie Supp. 2004) (App. 68)) and requires the distributor to pay the tax (*id.* § 63-2405 (App. 71)). The term "distributor" is defined in material part as any person "who receives motor fuel in this state." *Id.* § 63-2401(6) (App. 64). A separate section addresses the scope of the term "received" and provides, *inter alia*, that "[m]otor fuel imported into this state by a licensed distributor and delivered directly to a person not a licensed

distributor is received by the licensed distributor importing that fuel into this state at the time the fuel arrives in this state." *Id.* § 63-2403(4)(b) (App. 70-71). Arrival occurs "at the time [the fuel] crosses the border of this state." *Id.* § 63-2403(4)(c) (App. 71).

Chapter 174's amendments were prompted by the Idaho Supreme Court's decision in *Goodman Oil Co. v. Idaho State Tax Commission*, 28 P.3d 996 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002). There, a distributor contested its obligation to pay the state tax on fuel sold to a tribally-owned retailer on the Coeur d'Alene Indian Reservation. The Idaho court found the tax preempted by first construing the Hayden-Cartwright Act as inapplicable to Indian reservations (*id.* at 998-1002), and thus unavailable to negate the ordinary rule that States may not place the legal incidence of their taxes on tribes or tribal members with respect to on-reservation transactions, and then construing the state statute to impose legal incidence on retailers, not distributors (*id.* at 1002-04). On the latter issue, it quoted this Court's decision in *Chickasaw Nation* for the proposition that "[i]n determining who bears the legal incidence of the tax, absent clear language in the statute, the inquiry is one of 'fair interpretation of the taxing statute as written and applied.'" *Id.* at 1003. The motor fuel tax law lacked such "clear language," and the Idaho court accordingly looked to several provisions in the statute to reject both the State Tax Commission's construction that distributors bore the legal incidence and Goodman Oil's interpretation, which had

been accepted by the trial court, that the ultimate consumer shouldered it. *Id.* at 1002, 1003-04.[1]

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[1] The Idaho court also looked to the analysis in *Chickasaw Nation* concerning the Oklahoma fuel tax to support its construction of the motor fuels tax as imposing the legal incidence on retailers. It reasoned:

> The format and language of [the Oklahoma] statutes are strikingly similar to those at issue in this case. For example, like I.C. § 63-2406(4) that requires the licensed distributor to collect and remit the fuel tax, Oklahoma's law requires fuel distributors to remit the amount of taxes due to the Tax Commission of that state on behalf of the retailer. . . . Like I.C. § 63-2407(6), which allows the licensed distributor to deduct from future payments those taxes previously paid to the Commission that they are unable to collect from the buyer/retailer, Oklahoma's law allows distributors to deduct the uncollected amount from its future payments to the Tax Commission. . . .Similarly, both states' laws contain "no provision that sets off the retailer's liability when consumers fail to make payments due; neither are retailers compensated for their tax collection efforts. And, the tax imposed when a distributor sells fuel to a reservation applies whether or not the fuel is ever purchased by a consumer." . . . In addition, like I.C. § 63-2407(4), which credits the distributor to reimburse him for collecting and remitting the tax on behalf of the state of Idaho, Oklahoma law provides that "for their services as 'agent of the state for [tax] collection,' distributors retain a small portion of the taxes they collect."

Goodman Oil, 28 P.3d at 1003 (case citations omitted). The court's reference to § 63-2407(4) was actually to § 63-2406(4) and to a version of that provision in effect between July 1998 and June 2000 which stated:

> Any distributor required to collect the tax imposed by this chapter who fails to collect such tax or any distributor required to remit tax pursuant to this section who fails to make such remittance, shall be liable to the commission for the amount of the tax not collected or remitted plus any applicable penalty or interest.

This provision, however, was amended to its present form in 2000 Idaho Session Laws chapter 155, § 1 (55th Leg.). The 2000 amendment

(Continued on following page)

Chapter 174 specifically addressed the legal incidence issue in several provisions. Section 1 stated the lawmakers' intent to address the *Goodman Oil* decision by "expressly impos[ing] the legal incidence of motor fuels taxes upon the motor fuel distributor who receives (as 'receipt' is defined in Section 63-2403, Idaho Code) the fuel in this state." App. 133. Section 2 modified § 63-2402(1) to remove any doubt concerning that the taxable event is receipt of fuel by distributors. 2002 Idaho Sess. Laws ch. 174, § 2 (App. 133).[2] Chapter 174 additionally contained a Statement of Purpose that reflected the legislature's intent to respond to *Goodman Oil* and read in part:

> This bill establishes laws for the application of motor fuels taxes on Idaho's Indian reservations. It is designed to change the holding of the Idaho Supreme Court in the case of Goodman Oil Company of Lewiston, et al. v. Idaho State Tax Commission,

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substantially re-wrote the provision, removing reference to any requirement that a distributor collect the fuel tax from a purchaser. *See* Idaho Code § 63-2406(4) (Michie 2000) (App. 72) ("[a]ny distributor required to pay the tax imposed by this chapter who fails to pay such tax shall be liable to the commission for the amount of tax not remitted plus any applicable penalty or interest"). Nothing in the revised provision supports the proposition that a distributor has an obligation to collect the tax from retailers and remit it to taxing authorities.

[2] Section 2 of Chapter 174, as shown with the proposed amendment to the then-existing § 63-2402(1), read in material part:

> IMPOSITION OF TAX UPON ~~*USE*~~ *MOTOR FUEL*. (1) A tax is hereby imposed ~~*for the privilege of using the public highways upon the use or possession for use of gasoline, and*~~ *upon the receipt of motor fuel in this state by any distributor receiving motor fuel upon which the tax imposed by this section has not previously been paid. T*~~t~~he tax shall be imposed without regard to whether use is on a governmental basis or otherwise, *unless exempted by this chapter*.

App. 133.

> by expressly imposing the legal incidence of motor fuels taxes upon the motor fuel distributor who first receives the fuel in Idaho. [¶] Section 1 is a statement of legislative intent. Section 2 imposes both the tax on gasoline and the tax on special fuel directly on the distributor. Sections 3 through 12 make several required conforming changes.

App. 151. The Idaho legislature thus left no doubt that, whatever the merit of *Goodman Oil*'s construction of the prior statute, it intended distributors to bear the motor fuel tax's legal incidence and amended the law to reflect that intent.

II. THE LITIGATION BELOW

A. Respondent Coeur d'Alene Tribe filed a four-count complaint in the first of three actions challenging the amended statute's validity shortly after Chapter 174 became law. CR 1 (CV-02-185-S-BLW). Count One alleged that the tax is expressly and impliedly preempted by several federal laws, including most importantly the Indian trader statutes, 25 U.S.C. §§ 261-264. Count Two contended that the tax's imposition is inconsistent with the Due Process Clause of the Fourteenth Amendment because an insufficient "nexus" existed between Idaho and the Tribe's fuel distributor.[3] Count Three alleged that

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[3] The due process claim was premised on the unique geographical location of the Coeur d'Alene Reservation, which borders on the State of Washington and can be entered by highway without crossing off-reservation portions of Idaho. CR 1 at ¶ 7 (CV-02-185-S-BLW). The Tribe argued that motor fuel sold to its retail outlets was not "received" in Idaho because "ownership of the fuel transfers at the State of

(Continued on following page)

Chapter 174 failed to remove the tax's legal incidence from the retailer and therefore remained preempted in the absence of congressional authorization. The last count contended that a provision in Chapter 174 making the amendments retroactive to July 1996 violated the Due Process Clause by eliminating any "predeprivation or post-deprivation state law remedy available . . . to recover state motor fuel taxes deemed unlawful" in *Goodman Oil*. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1362. The district court entered an order temporarily restraining application of Chapter 174. CR 13 (CV-02-185-S-BLW).

Two days after entry of the temporary restraining order, the Nez Perce Tribe filed the second action. CR 1 (No. CV-02-203-CS-BLW). Its claims were, with minor exceptions, the same as the Coeur d'Alene Tribe's. This action was consolidated with the first (CR 11 (No. CV-02-203-CS-BLW)), and the temporary restraining order was extended by stipulation to motor fuel sold to the Nez Perce Tribe's retail outlet (CR 22 (No. CV-02-203-CS-BLW)). The Shoshone-Bannock Tribes filed the third action later in May 2002, asserting claims identical to those in the Nez Perce Tribe's amended complaint. CR 1 (No. CV-02-226-S-BLW). The district court consolidated the new proceeding with the earlier actions and extended the temporary restraining order to fuel sold to the Shoshone-Bannock Tribes' retail outlets. CR 56 (CV-02-0185-S-BLW).

At the time the litigation was commenced, one distributor delivered fuel to two gas stations owned by the Coeur d'Alene Tribe on its reservation and to one tribal

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Washington/Coeur d'Alene Reservation border, not on the Coeur d'Alene Reservation." CR 67 at 9 (CV-02-185-S-BLW).

gas station owned by the Nez Perce Tribe on claimed reservation lands. CR 32 at ¶¶ 3, 12 (CV-02-185-S-BLW); CR 47 at ¶¶ 1, 5 (CV-02-185-S-BLW); CR 50 at ¶¶ 4, 10 (CV-02-185-S-BLW). A second distributor delivered fuel to two retail stations owned by tribal members on the Coeur d'Alene Reservation. CR 32 at ¶ 12 (CV-02-185-S-BLW); CR 50 at ¶ 5 (CV-02-185-S-BLW). A third distributor delivered motor fuel to two retail outlets owned by the Shoshone-Bannock Tribes on the Fort Hall Reservation. CR 64 at ¶ 7 (No. CV-02-226-S-BLW). These distributors were licensed under the motor fuels tax statute and were not tribal entities.

B. Following submission of motions to dismiss by petitioners and cross-motions for summary judgment by all parties, the district court issued an order granting the Tribes' motions and denying petitioners' in August 2002. App. 47. The court addressed only two questions in detail: Whether the Hayden-Cartwright Act authorized application of the Idaho tax to fuel sold to the involved tribal gas stations, and whether the legal incidence of the tax, as modified by Chapter 174, fell on the distributor rather than the tribal retailer. It answered both questions negatively.[4]

In concluding that "the Hayden-Cartwright Act is not a congressional authorization to impose a motor fuels tax on Indians" (App. 53), the district court deemed applicable the canon of construction requiring "[s]tatutes affecting Indians . . . to be construed broadly, with any ambiguous

[4] The district court also rejected respondents' reliance on *Goodman Oil* as collaterally estopping petitioners from litigating the Hayden-Cartwright Act issue. App. 53 n.3. The court of appeals followed suit but did so at greater length. App. 22-27.

provision to be interpreted to their benefit." App. 54. From this premise, it concluded that "[t]he Hayden-Cartwright Act is not specific enough to authorize a motor fuels tax on Indian gas stations located in Indian Country." *Id.* The court recognized that while "Indian Reservations might come to mind when discussing reservations, the term 'reservation' has a much broader meaning." *Id.* "[G]iven the trust relationship that exists between the United States and Indian nations," it reasoned, "Congress must be more explicit if it intends to allow states to tax Indians." App. 54-55.

The district court's holding concerning the motor fuels tax's legal incidence began from the premise that *Goodman Oil*'s determination concerning legal incidence under the prior statute was "conclusive and binding as to the former statute" because the "the State Supreme Court is the final arbiter of state law." App. 57. It then characterized as "minimal" the amendments effected by Chapter 174. *Id.* The court premised this characterization on the fact that under the amended law, as under the statute at issue in *Goodman Oil*, "the mechanism for the distributor to obtain a refund [exists] if the retailer does not pay the tax." App. 58. Under these circumstances, "the legislature imposed no real burden on the distributor" since "the statute retains the 'pass through' quality of the prior statute." *Id.* The amended law was, in the court's view, "still a 'collect and remit' scheme which places the incidence of the tax on the Indian retailers." *Id.* The court rejected petitioners' reliance on *Chickasaw Nation* for the proposition that an express legislative declaration of which entity bears a tax's legal incidence is dispositive, stating that "the [Supreme] Court could not expect the state to make no changes in the substance of a tax and thereby

allow it to avoid the constitutional prohibition of imposing taxes on Indians." *Id.*

C. A majority of the Ninth Circuit panel reversed the order of the issues' consideration but affirmed the district court. App. 1. It began by setting forth several rules of construction believed relevant to the legal incidence issue, including that "we are to conduct 'a fair interpretation of the taxing statute as written and applied[,]'" that "[t]he person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden[,]" and that "a party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector." App. 9. The majority then rejected petitioners' position that, under *Chickasaw Nation*, a legislature's express allocation of legal incidence to distributors controls the issue. In its view, "[t]he incidence of a state tax on a sovereign Indian nation is a question of federal law that cannot be conclusively resolved in and of itself by the state legislature's mere statement." App. 11. The court read *Chickasaw Nation* as standing only for the proposition that state legislative allocation is dispositive of its intent but not of "the ultimate federal question of where the tax's legal incidence lies." App. 12.

The majority turned from rejecting petitioners' reliance on *Chickasaw Nation* to the question of where such incidence lies under the Idaho statute. In concluding that retailers continued to bear the legal incidence even after Chapter 174's amendments, the court construed the statute to have the following features:

- "Idaho law still requires the non-tribal distributor who receives the motor fuel and sells it to the Indian tribes to pass on and to collect

the tax from the retailer, and then to remit the taxes to the State." App. 17.

- "[A]s in *Chickasaw Nation*, the state statute in this case provides tax credits to the distributor for 'collecting and remitting' the tax on behalf of the State." App. 19.
- "Idaho gives tax credits to the distributor for fuel taxes that the distributor has paid but cannot then collect from the retailer." App. 20 (citing Idaho Code § 63-2407(6) (Michie Supp. 2004) (App. 76)).
- "Idaho law provides that the retailer has the right to any refund of fuel taxes sought by the distributor that the retailer has paid." App. 21 (citing Idaho Admin. Code 35.01.05.180.02 (App. 116)).

With respect to the first and most important ground, the court relied on two provisions – one of which imposes on distributors liability to the tax commission "for the amount of tax not remitted plus any applicable penalty or interest" (Idaho Code § 63-2406(4) (App. 72)) and another which states that "a portion of tax required to be paid upon the fuels sold shall, immediately upon receipt by the distributor or special fuels dealer, be state money and shall be held in trust for the state of Idaho and for payment to the commission in the manner and at the times required by this chapter" (*id.* § 63-2435 (App. 95)). It also relied on a tax commission regulation requiring that "all invoices for sales by distributors to retailers must show that the state fuel tax was charged to the retailer" (Idaho Admin. Code 35.01.05.150.01.g (App. 114)) and rejected petitioners' explanation that the rule's purpose was not to require the tax's pass-through but to provide an indication

of whether the purchaser bore the economic burden for refund entitlement purposes (App. 18 n.10). In sum, the majority concurred in the district court's characterization of the amended statute as a "'collect and remit' scheme" imposing the legal incidence on retailers.[5]

The majority began its Hayden-Cartwright Act analysis with the proposition that "we cannot hold that Congress has authorized state taxation of Indians or Indian reservations unless we determine that Congress has 'made its intention to do so unmistakably clear.'" App. 27. In this regard, it summarily rejected petitioners' argument that, given the Act's status as a statute of general applicability, the Indian canons did not apply to resolving whether the law applied to Indian reservations. In the court's view, the argument "misse[d] the preliminary point of statutory construction." App. 31. That "point" was "whether Section 10 of the Hayden-Cartwright Act gives a general command permitting state taxation of motor fuel sold to filling stations on Indian reservations" – *i.e.*, whether the Act *is* a statute of general applicability. *Id.*

The majority then proceeded to find an absence of the requisite unmistakable clarity based upon the language in

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[5] As to the second and third grounds, the majority was unpersuaded by petitioners' contention that the relied-upon provisions merely reflected "the commercial reality that the tax will be passed through the distribution chain" and constituted nothing more than a legislative determination to reduce the overall impact of the tax burden by allowing distributors to recover a portion of their administrative charges and to write off taxes paid on bad-debt fuel. App. 19. The final ground was raised *sua sponte* by the majority, and the court failed to consider whether, as a practical matter, the incidence of consumer nonpayment is sufficiently substantial to warrant establishing a bureaucratic mechanism for recovering amounts equal to the taxes paid on such bad debts.

section 10, other sections in the 1936 legislation, and legislative history. With respect to "United States military or other reservations," it reasoned that "[a]lthough the term 'reservation' is commonly used when referring to Indian reservations, the word has a broader reach" and that "[t]he intent of Congress in authorizing taxes on fuel delivered to United States 'reservations, in a statutory section that does not refer at all to Indians, Indian tribes, or Indian reservations,' cannot be said to mean that states have been unmistakably authorized to impose taxes on deliveries to tribal gas stations within Indian reservations." App. 32-33. The court further held that the reference to "licensed traders" in section 10 did not counsel a different conclusion, since "the phrase 'licensed trader' does not make unmistakably clear a congressional intent to authorize states to tax deliveries to tribal entities on Indian reservations." App. 33-34. It buttressed this conclusion by reference to other sections of the Hayden-Cartwright Act that mentioned "reservations," including one provision specifically applying to "Indian reservation roads," and reasoned that "[h]ad Congress intended in § 10 that 'United States military or other reservations' include Indian reservations, it could have made it clear." App. 34-35.

The court next considered the Act's legislative history indicating that the statute was passed in response to *Standard Oil Co. v. California*, 291 U.S. 242 (1934), which found imposition of a California fuel tax at a military installation preempted. "Nowhere in the legislative history is it made clear that Congress intended the Act to apply to Indians or that Congress made manifest its unmistakably clear intent to abrogate Indian sovereign immunity." App. 36. The majority rejected in a footnote petitioners' reliance

on administrative determinations issued shortly after the statute's adoption indicating the statute's applicability to Indian reservations with the observation that "the agency interpretations underscore the ambiguity, not the clarity, of the executive branch's statements insofar as they speak to the applicability of the Act to Indian reservations" and that, citing to an amicus brief filed by the Federal Government in *Chickasaw Nation*, "the United States today no longer holds the position that the Commissioners contend the United States held in the 1930s and '40s." App. 36 n.28.

Judge Kleinfeld dissented from judgment, stating that "the Hayden-Cartwright Act expressly authorizes the tax at issue because it permits the state to impose the tax regardless of its incidence" and that he found it unnecessary to address "the majority's highly indeterminate analysis of where the legal incidence of the tax falls." App. 38. With respect to the "reservation" issue, Judge Kleinfeld stated that "Indian reservations are 'reservations' for purposes of the statute" because the Act "explicitly covers 'reservations' and does not limit its coverage to military reservations" and because any ambiguity on that score "would be answered by [the Act's] express coverage of 'licensed traders.'" App. 39-40. He amplified both grounds, pointing out that "[t]he term 'reservation' ordinarily means and is most often used to mean Indian reservations" and that "[t]he term 'licensed trader' in federal statutes means one and only one thing: a person with a federal license to trade on an Indian reservation." App. 40. Judge Kleinfeld left open whether "sales of gasoline to Indian tribes can be taxed under the statute" – which he saw as "a different question, one not raised by the parties in this case." *Id.*

REASONS FOR GRANTING WRIT

The Ninth Circuit's conclusion that the legal incidence of the Idaho motor fuels tax is borne by retailers, and not distributors, departs from this Court's decision in *Chickasaw Nation* and conflicts with the South Dakota Supreme Court's determination in *Pourier v. South Dakota*, 658 N.W.2d 395 (S.D. 2003), *vacated in part on other grounds*, 674 N.W.2d 314 (S.D. 2004), *cert. denied*, 124 S. Ct. 2400 (2004). The court of appeals' holding, moreover, has a seriously disruptive effect across the broad swath of Indian law taxation matters because, as this Court emphasized in *Chickasaw Nation*, "[t]he initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax" because of the "categorical bar" against state taxation of tribes or their members with respect to reservation transactions absent congressional authorization. 515 U.S. 458-59. The ruling below effectively obscures the "'bright-line standard'" that the *amici curiae* States in *Chickasaw Nation* urged upon the Court as the *quid pro quo* for rejecting the Oklahoma Tax Commission's call to adopt "'economic reality'" as the guiding principle in determining whether a state tax impermissibly burdens a tribe. *Id.* at 460. This Court should remove any doubt that it meant what it wrote in *Chickasaw Nation* concerning the critical importance of legal incidence and the authority of state legislatures to decide where such incidence lies.[6]

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[6] As discussed above, Judge Kleinfeld declined to address in his dissent the legal incidence issue because he believed interpreting the Hayden-Cartwright Act as applicable to Indian reservations made it "unnecessary" to go further. App. 38. Petitioners respectfully disagree. Even if the Act applies, there will be further litigation over whether federal regulatory schemes placed into effect subsequent to the Act's

(Continued on following page)

Whether the Hayden-Cartwright Act extends to Indian reservations presents an important Indian law question for both tax and broader purposes. *First*, the Act is significant to state taxing authorities because, if applicable to such reservations, it constitutes the express congressional authorization that this Court requires as a condition precedent to direct imposition of a state tax on tribes or their members under the common-law "categorical" rule. By parity of reasoning, it also sanctions taxes imposed upon nonmembers who do on-reservation business with tribes or their members. Congress can alter the effect of the Hayden-Cartwright Act through adoption of a regulatory scheme that independently preempts a particular state tax, but that issue, as Judge Kleinfeld argued below, need not be resolved presently. *Second*, this question has significant ramifications with regard to the applicability of the Indian canons of construction. The Ninth Circuit majority held that *whether* a statute should be deemed as one of general applicability – in this case whether the Hayden-Cartwright Act encompasses all federal reservations – must be resolved by reference to those canons. Its approach is at odds with this Court's determination in *FPC v. Tuscarora Indian Nation*, 362

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passage preempt the motor fuels tax. *See White Mountain Apache Tribe*, 448 U.S. at 151 n.16. Should distributors, and not retailers, bear legal incidence, the tax will have been imposed off reservation at least as to the distributors doing business with the Nez Perce and Shoshone-Bannock Tribes, since those distributors take "receipt" of fuel off reservation. Whether the *White Mountain Apache* interest-balancing test applies under these circumstances is presented by the petition for writ of certiorari filed in *Richards v. Prairie Band Potawatomi Nation*, No. 04-___, with respect to the judgment in *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir. 2004). The Coeur d'Alene Tribe claims a different situation exists because its reservation borders on the State of Washington. *See* n.3, *supra*.

U.S. 99 (1960), that "general Acts of Congress apply to Indians as well as to all others" because the Hayden-Cartwright Act is plainly a "general Act." *Id.* at 120. This matter presents an opportunity for the Court to reaffirm the *Tuscarora* rule by reiterating that the Indian canons have no place in construing federal statutes which have not been enacted to further the special relationship between the United States and tribes.

I. THE NINTH CIRCUIT'S DETERMINATION THAT RETAILERS, AND NOT DISTRIBUTORS, BEAR THE MOTOR FUELS TAX'S LEGAL INCIDENCE MISAPPLIES *CHICKASAW NATION* AND CONFLICTS WITH THE SOUTH DAKOTA SUPREME COURT'S DECISION IN *POURIER*.

The court of appeals concluded that *Chickasaw Nation* stands for the proposition that an express allocation of legal incidence by a state legislature "is 'dispositive' as to what the legislature *intended*, removing the need to predict the legislative aim from reports and legislative statements, [but] it cannot be viewed as entirely 'dispositive' of the legal issue that the federal courts are charged with determining as to the incidence of the tax." App. 14. This re-conceptualization of *Chickasaw Nation* means that the metes and bounds of "legal incidence" are set by the judiciary, not by the state legislature, and that the object of reviewing tax legislation is not to decide which economic actor the legislature intended to bear legal incidence but which actor should be deemed to bear such incidence under independent federal common law standards. The panel majority's reasoning thus strikes at the very heart of

the compromise struck in *Chickasaw Nation* and warrants review.

This Court reiterated in *Chickasaw Nation* the distinction between the interest-balancing preemption standard applicable when a state tax is imposed on a nonmember doing on-reservation business with a tribe and the categorical preemption standard applicable "when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country[.]" 515 U.S. at 458. Whether the tax is levied on a tribe or its members, as opposed to a nonmember, is determined by which economic actor bears the legal incidence – *i.e.*, whom the state legislature intends the taxpayer to be. *E.g.*, *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347-48 (1968). The Court quoted with approval the position of 11 *amici curiae* States that the legal incidence standard – in contrast to the "more venturesome approach" proffered by the Oklahoma Tax Commission that would "make 'economic reality' our guide" – "'provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority.'" 515 U.S. at 460. An added virtue of the legal incidence approach, the Court stressed, was the ordinary ability of a State "to amend its law to shift the tax's legal incidence" to a non-tribal actor by, for example, "'*declaring* the tax to fall on the consumer and directing the Tribe to collect and remit the levy.'" *Id.* (emphasis supplied). The Oklahoma motor fuels tax statute, however, did "not expressly identify who bears the tax's legal incidence – distributors, retailers, or consumers" or "contain a 'pass through' provision, requiring distributors and retailers to pass on the tax's cost to consumers." 515 U.S. at 461. Only because

"such dispositive language" was absent did the question become "one of 'fair interpretation of the taxing statute as written and applied.'" *Id.*

Here, the Idaho legislature included the requisitely "dispositive language" in section 2 of Chapter 174 – which expressly stated its intent to address the holding in *Goodman Oil* and to impose the legal incidence on distributors (App. 133, 151) – and in effecting its intent through the amendment to Idaho Code § 63-2402(1) that eliminated any question that the taxable event is the receipt of fuel by distributors. The Ninth Circuit majority, however, read *Chickasaw Nation* as permitting it to place that "dispositive language" aside and to infer from bits and pieces of other provisions a mandatory pass-through of the tax from the distributor to the retailer. While petitioners vigorously argued the contrary and assigned significance to those provisions consistent with the absence of a mandated pass-through, the court of appeals did not identify, or even suggest the existence of, an *explicit* pass-through requirement. The Idaho law is instead similar to the Oklahoma statute examined in *Chickasaw Nation* insofar as the legislative intent to impose a pass-through requirement could be determined only by making an interpretative assessment of various provisions. However, there can be no doubt that, had the Oklahoma law contained "dispositive language" comparable to that in Chapter 174, such an assessment would have been unnecessary – *i.e.*, the ambiguity with respect to the legal incidence issue would have been resolved and the need for the "fair interpretation" analysis negated.

The majority below, in sum, plainly departed from the path blazed by this Court in *Chickasaw Nation*. This departure has more than academic significance because it

means, in practical terms, that express state legislative determinations as to legal incidence will be meaningless, thereby vitiating the "'bright-line'" accommodation struck by *Chickasaw Nation* in favor of tax administration predictability. The Ninth Circuit's application of *Chickasaw Nation*, in short, reflects a palpable "conflict in principle" with this Court's decision that warrants review. *Or. Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 764 (1985).[7]

The Ninth Circuit's application of *Chickasaw Nation* also squarely conflicts with the decision in *Pourier*. There, the South Dakota Supreme Court was faced with the question whether the state motor fuel tax's legal incidence fell on marketers or consumers given the legislature's express allocation of such incidence to the latter. *See* S.D. Consol. Laws § 10-47B-42. Responding to the revenue department's reliance on *Chickasaw Nation*, the court remarked that "[a]lthough one may question the wisdom of permitting a state to determine the entity who bears the legal incidence of a tax by merely making cosmetic changes to a statute, that is what the Court in *Chickasaw* did." 658 N.W.2d at 405. It then held that "despite indications in the statute that it may be the marketer who is ultimately responsible to pay the tax, the legal incidence falls upon the consumer." *Id.* The *Pourier* court, in other words, recognized that the legislative declaration was

[7] Because the Idaho motor fuels tax statute does not contain an express pass-through provision, no need exists to resolve whether a legislature could declare legal incidence to fall on one class of market participants and simultaneously expressly require those participants to pass the tax through to another class. Nevertheless, under such an unlikely situation, the appropriate challenge by a tribe most logically would be to the mandatory pass-through provision, not to the tax itself.

conclusive and that it was foreclosed from doing precisely what the majority below did: Engaging in a "fair interpretation" analysis to reach a legal incidence allocation contrary to the legislature's determination.

II. THE NINTH CIRCUIT'S CONSTRUCTION OF THE HAYDEN-CARTWRIGHT ACT NOT ONLY IGNORES THE STATUTE'S EXPLICIT LANGUAGE AND PURPOSE BUT ALSO FUNDAMENTALLY MISPERCEIVES THE REACH OF THE INDIAN CANONS.

A. In Idaho, motor fuel taxes are used to benefit the public highway and road system that accommodates vehicle use and the attendant fuel consumption. *See* Idaho Code § 63-2412 (Michie Supp. 2004) (App. 82). The same can be said for virtually all States. Fed. Highway Admin., Provisions Governing the Disposition of State Motor-Fuel Receipts (Jan. 1, 2001), *available at* http://www.fhwa.dot.gov/ohim/hwytaxes/2001/tab6_toc.htm. Idaho, like other States, thus has a strong incentive to maximize collection of otherwise due fuel taxes because they are the lifeblood of state highway infrastructure. That infrastructure in Idaho includes an extensive road system on or through the reservations currently claimed by or set aside for respondents Nez Perce Tribe and Shoshone-Bannock Tribes as to which the State exercises jurisdiction under Public Law 83-280, Act of Aug. 15, 1953, 67 Stat. 588, over the "[o]peration and management of motor vehicles" (Idaho Code § 67-5101G (Michie 2001)). CR 32 at ¶ 8 (CV-02-185-S-BLW); CR 60 at

¶ 2 (CV-02-185-S-BLW); CR 64 at ¶ 10 (CV-02-185-S-BLW); CR 70 at ¶ 4 (CV-02-185-S-BLW).[8]

The dedication of motor fuel taxes to highway construction and maintenance is not a recent phenomenon and had taken root prior to the Hayden-Cartwright Act's adoption. *See In re Op. of Supreme Ct.*, 257 N.W.2d 442, 444 (S.D. 1977) (noting impact of antidiversion provision in section 12 of the 1934 Hayden-Cartwright Act, 48 Stat. 993, 995, that penalized States for using motor-vehicle revenue for non-highway purposes). Congress was therefore acutely aware of the importance of fuel taxes to upkeep and expansion of state road systems when it passed the Act in 1936. United States Dep't of Transp., *America's Highways: 1776-1976* 244-45 (1976) (describing the substantial growth in reliance on motor fuel taxes between 1921 and 1931 to finance highway and street expenditures). Indeed, the statute was passed in response to concerns raised by state tax administrators to this Court's decision in *Standard Oil*, which held the sale and delivery of fuel to a post exchange on a military reserve to be outside the scope of state tax authority because the involved State had "granted to the United States exclusive legislative jurisdiction" with respect to the reserve. 291 U.S. at 244; *see* 79 Cong. Rec. 4083 (1935); 80 Cong. Rec. 6913 (1936).

The Hayden-Cartwright Act's objective was consequently to overturn *Standard Oil* by granting a specific

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[8] Petitioners additionally submitted similar information with respect to respondent Coeur d'Alene Tribe (CR 32 at ¶ 7 (CV-02-185-S-BLW)) during the summary judgment proceedings below, but the Tribe disputed the showing under Fed. R. Civ. P. 56(f) because of insufficient opportunity to conduct discovery. CR 68 at ¶ 2 (CV-02-185-S-BLW).

form of taxing authority within federally reserved lands where the States otherwise lacked such power. Congress clearly had no thought of limiting the grant to military reserves, since it used the term "United States military or *other* reservations" (emphasis supplied) and listed instrumentalities of sale – *e.g.*, filling stations and licensed traders – found on federal reservations other than military ones. The presumably guiding principle in determining the scope of "other reservations" instead was the presence of land within a State that, by virtue of its federal status, affected state authority to tax motor fuel transactions. That this principle should animate the Act's construction is supported further by the congressional object of enhancing state motor fuel revenue through abolishing federal enclave tax-free zones.

No dispute exists that Indian reservations fell within the commonly accepted meaning of the term "reservation" in 1936. *United States v. Celestine*, 215 U.S. 278, 285 (1909). State taxing authority, at least as to Indians and tribes, also had long been circumscribed within reservation lands. *E.g.*, *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1866) ("[a]s long as the United States recognizes their national character [the Indians] are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws"); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866) (state lacked authority to tax reservation lands for purposes of funding road construction). The similarity of treatment between the United States and tribes for purposes of tax immunity became explicit through extension of the federal instrumentality doctrine to reservation lands (*United States v. Rickert*, 188 U.S. 432, 437 (1903)) and later to income of non-Indians from tribal leases (*e.g., Gillespie v. Oklahoma*,

257 U.S. 501, 505 (1922)). That doctrine remained in place until after the Hayden-Cartwright Act's passage. *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 383-86 (1938); *see Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163, 173-74 (1989) (tracing application of federal instrumentality doctrine to tribal leasing activities). As Judge Kleinfeld argued in his dissent below, there is no reason why, given the Act's purpose and language, the term "other reservations" should be construed to exclude Indian reservations, particularly when Congress juxtaposed that term with another – licensed trader – that has unique significance to Indians and Indian reservations.[9]

B. The Ninth Circuit majority maneuvered around the straightforward text of the Hayden-Cartwright Act only by invoking the Indian canons of construction. In so doing, it rejected petitioners' position not only that the canons may not be used to introduce ambiguity where none exists otherwise (*e.g.*, *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986)) but also, that under *Tuscarora*, they do not apply because the statute is

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[9] The terms "reservation" and "licensed trader" appeared together in 14 reported federal decisions issued prior to 1936. All involved Indians. *Green v. Menominee Tribe*, 233 U.S. 558 (1914); *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681 (1914); *United States v. Parkhurst-Davis Mercantile Co.*, 176 U.S. 317 (1900); *Eddy v. Lafayette*, 163 U.S. 456 (1896); *Kansas or Kaw Tribe v. United States*, 80 Ct. Cl. 264 (1934); *Medawakanton and Wahpakoota Bands of Sioux Indians v. United States*, 57 Ct. Cl. 357 (1922); *United States Express Co. v. Friedman*, 191 F. 673 (8th Cir. 1911); *United States v. Douglas*, 190 F. 482 (8th Cir. 1911); *Green v. Menominee Tribe*, 46 Ct. Cl. 68 (1911), *aff'd*, 233 U.S. 558 (1914); *Eddy v. Lafayette*, 49 F. 807 (8th Cir. 1892), *aff'd*, 163 U.S. 456 (1896); *Thayer v. United States*, 20 Ct. Cl. 137 (1885); *Stuart v. United States*, 1859 WL 5368 (Ct. Cl. 1859); *Mason v. Sims*, 5 F.2d 255 (W.D. Wash. 1925); *United States v. Inaba*, 291 F. 416 (E.D. Wash. 1923).

a "general Act of Congress." *See Tuscarora*, 362 U.S. at 120 ("general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary").[10] The court reasoned, in practical effect, that the Indian canons should be applied to resolve *whether* the Hayden-Cartwright Act is a "general Act." This anomalous approach, with its patent misreading of *Tuscarora*, warrants review and correction.[11]

The issue in *Tuscarora* was whether certain tribal lands were part of a "reservation" as defined in Federal Power Act ("FPA") and, if not, whether they were subject

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[10] Another canon of construction relevant to the "reservation" issue is the presumption that Congress is aware of an administrative interpretation of a statute and that it adopts that interpretation when re-enacting the law without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Here, both the Attorney General and the Department of the Interior's Solicitor interpreted the Hayden-Cartwright Act as applicable to Indian reservations shortly after the statute's enactment and before any amendments to it. 38 Op. Att'y Gen. 522 (1936); 57 Interior Dec. 129 (1940). The Act was amended several times thereafter without any modification suggesting disapproval of the administrative construction. Pub. L. No. 76-819, § 7, 54 Stat. 1059, 1060 (1940); Pub. L. No. 80-279, § 104, 61 Stat. 641, 644 (1947); Pub. L. No. 84-876, 70 Stat. 799 (1956). The court of appeals gave the canon no weight because, in the majority's view, the administrative decisions "underscore[d] the ambiguity, not the clarity, of the executive branch's statements" and because "the United States no longer holds the position that the Commissioners contend the United States held in the 1930s and '40s." App. 36 n.28. The majority's first ground assumed applicability of the Indian canons, as did the Federal Government's litigating position in *Chickasaw Nation* that the court relied upon for the second ground.

[11] It warrants emphasis that the Ninth Circuit is the first appellate court to address the question whether *Tuscarora* precludes application of the Indian canons to determining the geographical reach of the Hayden-Cartwright Act. Both the Idaho Supreme Court in *Goodman Oil* and the South Dakota Supreme Court in *Pourier* set about their interpretative analysis with the unexamined premise that the canons applied. *Goodman Oil*, 28 P.3d at 998; *Pourier*, 658 N.W.2d at 399.

to condemnation when necessary for the construction, maintenance, or operation of a federally-licensed project. This Court first held that the "artificial[]" definition of "reservation" in the FPA included only federally owned lands within Indian reservations. 362 U.S. at 111. It turned then to the tribe's contention that the FPA's condemnation provision was inapplicable to tribal fee lands. The Court stated that the statute "constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any streams or other bodies of water over which Congress has jurisdiction under its commerce powers" and that the "[t]he Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians." *Id.* at 118. It, therefore, held that the FPA's general condemnation provision "applies to the[] lands owned in fee simple by the Tuscarora Indian Nation" (*id.*), since "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests" (*id.* at 116).

No question exists here that the Hayden-Cartwright Act applies to "United States military or other reservations" – a term that on its face makes no exception for Indian reservations – and to all taxes "upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline other motor fuels" without reference to whether tribes or their members are involved in the transaction to which the tax relates. The court of appeals' misunderstanding of *Tuscarora* derives from failing to appreciate that, in a statutory context, the Indian canons apply only to "'statutes passed for the benefit of dependent Indian

tribes.'" *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)); *see also Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) ("the presumption [in *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985), requiring ambiguities to be construed favorably to tribes] applies only to federal statutes that are 'passed for the benefit of dependent Indian tribes'"); *cf. DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) (declining to construe, without reference to Indian canons, Freedom of Information Act to include federal-tribal communications within intra-agency exception). The Hayden-Cartwright Act does not fall into that category of congressional action.[12]

[12] Review of the Ninth Circuit's judgment also provides an opportunity to reiterate or clarify the *Tuscarora* holding on another point. The Tenth Circuit Court of Appeals has limited the holding to federal statutes that affect "property rights," but no such rights are at stake here. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (*en banc*) (section 8(a)(3) of the National Labor Relations Act does not preclude a tribe from adopting ordinance prohibiting union security agreements).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE; SHOSHONE-BANNOCK TRIBES, *Plaintiffs-Appellees*, v. DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission, *Defendants-Appellants.*	No. 02-35965 D.C. No. CV-02-00185-DOC
COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE, *Plaintiffs*, and SHOSHONE-BANNOCK TRIBES, *Plaintiff-Appellant*, v. DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission, *Defendants-Appellees.*	No. 02-35998 D.C. No. CV-02-00185-BLW

COEUR D'ALENE TRIBE OF IDAHO,

Plaintiff-Appellant,

and

SHOSHONE-BANNOCK TRIBES; NEZ PERCE TRIBE,

Plaintiffs,

v.

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission,

Defendants-Appellees.

No. 02-36020

D.C. No. CV-02-00185-DOC

Appeal from the United States District Court
for the District of Idaho
David O. Carter, District Judge, Presiding

Argued and Submitted
December 2, 2003 – Seattle, Washington

Filed August 19, 2004

Before: Andrew J. Kleinfeld, Ronald M. Gould, and Richard C. Tallman, Circuit Judges.

Opinion by Judge Gould;
Dissent by Judge Kleinfeld

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OPINION

GOULD, Circuit Judge:

We must decide whether Indian tribes have sovereign immunity from an Idaho state tax on motor fuel delivered by non-tribal distributors to tribally-owned gas stations for sale on Indian reservations. The Supreme Court of Idaho ruled in 2001 that the incidence of essentially the same tax fell impermissibly on the Indian tribes, and that Congress had not through the Hayden-Cartwright Act authorized states to abrogate the Indian tribes' sovereign immunity from taxation on the fuel sold on their reservations. After this state court ruling became final, the Idaho legislature attempted to modify the impact of the state court ruling by amending the tax law to provide expressly that the incidence of the Idaho state tax falls on the non-tribal distributors, not on the tribes who owned the retail gas stations located on the tribes' reservations. The tribes sued the Idaho State Tax Commissioners ("Commissioners") in federal district court to enjoin them from collecting the motor fuels tax. Notwithstanding the legislative amendment, the district court reached the same conclusion that the Supreme Court of Idaho had reached, that the incidence of the tax fell on the tribes and that sovereign immunity had not been waived. The district court accordingly granted summary judgment to the tribes and enjoined the Commissioners from enforcing the Idaho Motor Fuel Tax on "motor fuel delivered to, received by, or

sold by Tribal or Indian owned retail gasoline stations in the Coeur d'Alene, Nez Perce, or Shoshone Bannock Reservations."

The Commissioners appeal the district court's decision and present two issues: Does the legal incidence of the tax fall impermissibly on Indian retailers, or permissibly on non-tribal distributors? If the incidence falls on the Indians, does the Hayden-Cartwright Act, which authorizes states to tax motor fuel sales on "United States military or other reservations," apply to Indian reservations? On the second of these issues, we must address the tribes' argument on cross-appeal that because the Supreme Court of Idaho has previously ruled on the applicability of the Hayden-Cartwright Act in this context, the state is barred from re-litigating the matter. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

The federally recognized tribes pursuing this litigation – the Coeur d'Alene Tribe, the Nez Perce Tribe, and the Shoshone-Bannock Tribes (collectively, "Tribes") – own and operate retail gas stations on their Idaho reservations. For several years, the Idaho State Tax Commission ("Commission") imposed a tax of twenty-five cents per gallon on all motor fuel delivered to the Tribes' retail gasoline centers within the borders of the Tribes' reservations. The Tribes' fuel distributor, pursuant to Idaho statute, collected the motor fuels tax and remitted it to the Commission. Substantially all proceeds from the state motor fuel tax are used for highway construction and maintenance.

In 2001, the Supreme Court of Idaho declared unlawful the State's taxation of the Indian reservations. *See Goodman Oil Co. v. Idaho State Tax Comm'n,* 136 Idaho 53, 28 P.3d 996 (Idaho 2001), *cert. denied,* 534 U.S. 1129, 122 S.Ct. 1068, 151 L.Ed.2d 971 (2002). In *Goodman Oil,* the Supreme Court of Idaho held that the legal incidence of the state fuel tax falls on the retailers, and that federal law bars the imposition of the tax on tribal retailers in the absence of clear congressional authorization. The state supreme court ruled, in turn, that section 10 of the Hayden-Cartwright Act, codified as amended at 4 U.S.C. § 104, does not provide the required authorization of the State to collect the fuel tax from distributors who sell fuel to tribal retailers on Indian reservations. Section 10 of the Act, in part, states:

> Tax on motor fuel sold on *military or other reservation* [;] reports to State taxing authority
>
> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, *located on United States military or other reservations,* when such fuels are not for the exclusive use of the United States.
>
> (b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is

> located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

4 U.S.C. § 104 (emphasis added).

Following the decision in *Goodman Oil,* each Tribe enacted its own fuel tax for improving and maintaining roads on its reservations. The Idaho state legislature responded to the Supreme Court of Idaho's decision in *Goodman Oil* by amending the motor fuel tax on March 23, 2002. The amended law declared that the legal incidence of the tax was not on the retailer, but was on the distributor. 2002 Idaho Sess. Laws ch. 174 (H.B.732) ("Chapter 174"). The legislature declared explicitly in the law's uncodified "Statement of Intent" that:

> The Legislature intends by this act to modify the holding of the Idaho Supreme Court in the case of *Goodman Oil*. . . . Specifically, the Legislature intends, by this act, to expressly impose the legal incidence of motor fuels taxes upon the motor fuel distributor who receives (as "receipt" is defined in Section 63-2403, Idaho Code) the fuel in [Idaho]
>
> . . . .

Chapter 174, § 1. In addition to stating that the legal incidence of the tax is intended to fall on the fuel distributor, the legislature amended the statute to indicate that the Commission was no longer imposing the tax "for the privilege of using the public highways upon the use or possession for use of gasoline," but rather, was imposing the tax "upon the receipt of motor fuel in this state by any distributor receiving motor fuel upon which the tax imposed by this section has not previously been paid." Idaho

Code § 63-2402(1). *See also id.* § 63-2405 (the tax "imposed by section 63-2402 . . . is to be paid by the distributor, and measured by the total number of gallons of motor fuel received by him").

After the amendments of Chapter 174, which the legislature made retroactive to July 1, 1996,[1] the Indians' fuel distributor was required to collect and remit to the state the tax on fuel sold to the Tribes. After the amended law became effective, the Tribes went to federal district court to enjoin the Commissioners from collecting the motor fuels tax. The Tribes argued, *inter alia,* that the legal incidence of the fuel tax continued to fall unlawfully on the Indian retailers despite the legislative amendment, and that the tax was unenforceable because the United States Congress had not clearly authorized abrogation of the Indian tribes' sovereign immunity.

The district court addressed whether the legal incidence of the tax, as modified by Chapter 174, fell on the distributor, and whether the Hayden-Cartwright Act authorized application of the motor fuels tax to fuel sold to the Indians on their reservations. Answering "no" to both questions, the district court granted the Tribes' motions for summary judgment, and enjoined the state "from enforcing the Idaho Motor Fuel Tax, I.C. § 36-2401, *et seq.* . . . with respect to motor fuel delivered to, received by, or sold by Tribal or Indian owned retail gasoline stations on the Coeur d'Alene, Nez Perce, or Shoshone Bannock Reservations." *Coeur D'Alene Tribe v. Hammond,* 224 F. Supp. 2d

[1] The permissibility of the state legislature's designation of the amendments as retroactive is not at issue on this appeal.

1264, 1271 (D.Idaho 2002). The Commissioners appeal the summary judgment entered against them.[2]

We first analyze where the legal incidence of the tax falls, considering both the legislative amendments to the statute and its operative provisions. Concluding that the tax incidence still falls on the Tribes, we next address the Tribes' cross-appeal urging that the Commissioners are barred from relitigating the question whether the Hayden-Cartwright Act provides clear congressional authorization for the state tax. Concluding that there is no bar to relitigation by the Commissioners in this context, we resolve the question whether the Hayden-Cartwright Act, by authorizing state taxation of motor fuel delivered to "United States military or other reservations," permits the Commissioners to tax motor fuel delivered to and sold on the Tribes' Indian reservations.

II

Whether the legal incidence of the Idaho motor fuel tax is borne by the non-tribal distributors, or by the Indian retailers to whom the distributors sell the motor fuel, is a "frequently dispositive question in Indian tax cases," because "[i]f the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458-59, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995). Stated simply, if the state tax's incidence falls on the Indians, it is unlawful absent a

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[2] Our review of the summary judgment is de novo. *SEC v. Dain Rauscher, Inc.,* 254 F.3d 852, 855 (9th Cir. 2001).

"clear congressional authorization" to the contrary.[3] *Id.* at 459.

The question of where the legal incidence of a tax lies is decided by federal law. *See Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110, 121, 74 S.Ct. 403, 98 L.Ed. 546 (1954). As a general rule for deciphering legal incidence, the United States Supreme Court has instructed that we are to conduct "a fair interpretation of the taxing statute as written and applied." *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe,* 474 U.S. 9, 11, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) (per curiam). The person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden. *See Chickasaw Nation,* 515 U.S. at 460. Rather, to discern where the legal incidence lies, we "ascertain[] the legal obligations imposed upon the concerned parties," and this inquiry "does not extend to divining the legislature's 'true' economic object." *Crow Tribe of Indians v. Montana,* 650 F.2d 1104, 1111 (9th Cir. 1981). Further, a party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector. *Chickasaw Nation,* 515 U.S. at 461-62; *see also United States v. Cal. State Bd. of Equalization,* 650 F.2d 1127, 1131 (9th Cir. 1981) ("[T]he legal incidence of a tax does not necessarily fall on the party who acts as conduit by forwarding collected taxes to the state.").

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[3] If the incidence of the tax falls on the non-tribal distributors, we conduct a balancing test weighing federal, state, and tribal interests, in addition to considering any federal law to the contrary. *Chickasaw Nation*, 515 U.S. at 459.

A

As we have noted, before the Idaho legislature amended the tax statute to assert its explicit intention to have the legal incidence fall on the non-tribal distributors, the Supreme Court of Idaho had squarely held that the incidence of the Idaho state fuel tax lay impermissibly on the Indians. *Goodman Oil,* 28 P.3d at 1004. The district court here held that despite the subsequent legislative amendment to the state tax, which recited that the state legislature intended the tax's incidence to fall on the non-tribal distributors, the incidence of the tax remained unchanged. The district court rejected the defendant Commissioners' argument that the "incantation by the legislature that the legal incidence falls on the distributor" is conclusive, *Hammond,* 224 F. Supp. 2d at 1270. The district court was not persuaded that conclusive legal effect had to be given the state legislature's statements. Defendants had relied upon the legislature's statement of intention in the amendment, and had urged as controlling the Supreme Court's reference in *Chickasaw Nation* to "dispositive language" from a state legislature. The district court rejected this argument, reasoning: "Certainly, the [Supreme] Court could not expect the state to make no changes in the substance of the tax and thereby allow it to avoid the constitutional prohibition of imposing taxes on Indians. Moreover, such a simplistic view would undo the nuanced application of law that the Court undertook in [*Chickasaw Nation*]." *Id.* at 1270-71.

On the Commissioners' appeal of the district court's decision about legal incidence, we first address the Commissioners' reiterated argument that the legislature's amendment to the law is sufficient to settle the matter about where the incidence lies. The Commissioners continue to

rely on *Chickasaw Nation* for the proposition, advanced tenaciously, that the legislature's designation is "dispositive" to decide legal incidence. 515 U.S. at 461. In *Chickasaw Nation,* the Supreme Court held that an Oklahoma motor fuels tax was not applicable to fuel sold by Indian tribes on their reservations. In so holding, the Court noted that the statute in question did "not expressly identify who bears the tax's legal incidence," and that "[i]n the absence of such dispositive language, the question is one of fair interpretation of the taxing statute as written and applied." *Id.* at 461. The Commissioners read this to mean that our sole function as a reviewing court deciding the question of a tax's legal incidence is to determine the legislature's intent. The Commissioners contend that if the state legislative intent is clear, we must without more defer to the state legislature's interpretation of its own statute, and the analysis of incidence ends there.[4] We disagree.

The incidence of a state tax on a sovereign Indian nation inescapably is a question of federal law that cannot be conclusively resolved in and of itself by the state legislature's mere statement. The Supreme Court in *Chickasaw Nation* was not facing the case of an explicit legislative designation. *See* 515 U.S. at 461 ("The Oklahoma legislation does not expressly identify who bears the tax's legal

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[4] The Commission also relies on *United States v. Cal. State Bd. of Equalization,* 650 F.2d 1127, 130-31 (9th Cir. 1981), for the proposition that "[t]he legal incidence of a tax falls on the party who the legislature intends will pay the tax." This is not the end of the story, however, for the legislature's statement of its own intention is not solely determinative of the legal incidence question. We went on to state in that case, "In determining who the legislature intends will pay the tax, the *entire state taxation scheme* and the context in which it operates *as well as the express words of the taxing statute must be considered.*" *Id.* at 1131 (emphasis added).

incidence – distributors, retailers, or consumers[.]"). In that sense, one might view as dictum the sentence in *Chickasaw Nation* relating to explicit legislative designation of intent concerning incidence.[5] Even if it could be considered a dictum, however, that would be of little significance because our precedent requires that we give great weight to dicta of the Supreme Court. *See United States v. Montero-Camargo,* 208 F.3d 1122, 1132 n. 17 (9th Cir. 1998) ("Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.") (internal quotation marks and citations omitted).

Nonetheless, whether we view the statement in *Chickasaw Nation* as holding by which we are bound, or as a dictum that we must consider seriously, the Supreme Court's use of the term "dispositive" in context appears to us to relate to the legislature's *intent* about where the incidence of the tax lies, and not to the ultimate federal question of where the tax's legal incidence lies. If the legislature could indirectly tax Indian nations merely by reciting *ipso facto* that the incidence of the tax was on another party, it would wholly undermine the Supreme Court's precedent that taxing Indians is impermissible absent clear *congressional* authorization. *See Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 765 (1985) (concluding that the Indians' exemption from state taxation is

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[5] The district court here characterized the statement from *Chickasaw Nation* relied upon by the Commissioners as "merely dicta," and went on to give its reasons why the state legislative declaration, without change of substance in the statute, could not be controlling. *Hammond,* 224 F. Supp. 2d at 1270-71.

lifted "only when Congress has made its intention to do so unmistakably clear."). Such a holding would permit states to set policy in a way that risks undermining the preserved sovereignty of Indian nations. We do not believe that the Supreme Court's precedent can properly be so construed.

As we have already noted, the question of incidence has been explicitly held by the United States Supreme Court to be one of federal law. *Kern-Limerick, Inc.*, 347 U.S. at 121. *Chickasaw Nation,* though it did mention the notion of a "dispositive" legislative intent, did not overrule *Kern-Limerick.*[6] In *Kern-Limerick,* the Supreme Court squarely rejected the idea that "a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign," because "[s]uch a conclusion . . . would deny the long course of judicial construction which establishes

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[6] Even if it could be argued that the sentence relied upon by the Commissioners from *Chickasaw Nation* to a degree undermines *Kern-Limerick,* we are not at liberty to disregard the holding of *Kern-Limerick* that federal law controls a determination of tax incidence. The courts of appeals may not hold that a subsequent Supreme Court case has rendered unsound an earlier Supreme Court case, for it is the Supreme Court's own prerogative to assess its cases. *See, e.g., Hoffman v. Arave,* 236 F.3d 523, 542 (9th Cir. 2001) ("[I]t is not our place to engage in anticipatory overruling. The Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.'" (citing *Agostini v. Felton*, 521 U.S. 203, 207 (1997)). However, the argument of inconsistency is not persuasive because the natural reading of *Chickasaw Nation's* text, for us, suggests that a legislative declaration is dispositive of the legislature's intent, not that it necessarily and conclusively answers the ultimate question of legal incidence of a state tax, at least where the tax would intrude on Indian sovereignty.

as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Id.* The district court elaborated persuasively on this point, stressing that there had been "no change in the substance of the tax [.]" *Hammond,* 224 F. Supp. 2d at 1270-71. *See also Lawrence v. State Tax Comm'n of Mississippi,* 286 U.S. 276, 280 (1932) ("The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax, but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.") (internal citations omitted).

We agree with the Tribes that if we determined legal incidence solely by looking at the legislature's stated intent, we would be permitting the state to name one party the taxpayer while requiring another to pay the tax, in the process avoiding tax immunities held by the second party. Thus we conclude that, while the legislative declaration is "dispositive" as to what the legislature *intended,* removing the need to predict the legislative aim from reports and legislative statements, it cannot be viewed as entirely "dispositive" of the legal issue that the federal courts are charged with determining as to the incidence of the tax. And this is not merely a technical tax issue: If state legislatures could tax Indian tribes merely on the assertion that the incidence of the tax lies elsewhere, it would permit states indirectly to threaten the very existence of the Tribes. It has long been understood in our nation that, in the adage coined by the great Chief Justice John Marshall, the unchecked power to tax is the power to destroy. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819).

Our conclusion is reinforced by the context here. The Supreme Court of Idaho had previously ruled in *Goodman Oil* that the incidence of the tax was on the Indians under the pre-existing statutory scheme. That state supreme court decision is entitled to weight on how we assess the legal incidence of the tax from its operation. *See American Oil Co. v. Neill,* 380 U.S. 451, 455-56 (1965) ("When a state court has made its own definitive determination as to the operating incidence [of a tax], our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive."). The Commissioners urge us to accord little weight to the Supreme Court of Idaho's determination, pointing out that the state supreme court's analysis was predicated on the statute *before* the law was amended by the legislature. That is true so far as it goes, but the more important point, as the district court reasoned, is that the operative tax provisions on which *Goodman Oil* was based, as previously analyzed by the state's highest court, remained in substance unchanged by the state legislative efforts to circumvent *Goodman Oil.*[7] Aside from adding a legislative purpose statement to the tax statute, the legislature made only minimal and cosmetic changes to the tax law, and did

[7] The Commissioners' reliance on *Chickasaw Nation*, 515 U.S. at 460 for the proposition that "if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence," is inapposite here. Such an amendment would accomplish the stated goal if the amendment shifted the *substance* of the legal burdens of the tax, instead of simply cosmetically re-assigning the incidence of the tax to suit the legislature's interests.

not alter the key substantive tax provisions that undergirded the state court's decision about legal incidence.[8]

Under our view of the law as declared by the Supreme Court, we conclude that we should not, under the circumstances of this case, automatically defer to the Idaho state legislature's mere say-so about where the legal incidence of its motor fuels tax lies. We believe that automatic deference cannot follow where the incidence was previously determined to be on the Tribes by the Supreme Court of Idaho and the state legislature's subsequent amendments to the law, though adding a statement of legislative intent on incidence, did not materially alter the operation of the statute or its probable impact on the Tribes. A state legislature's declaration of intent cannot be viewed as alone controlling on the federal question whether the legal incidence of a state tax falls on a sovereign Indian nation.

B

We must evaluate the incidence of the Idaho Motor Fuels Tax in light of the state statutory scheme, an

[8] For example, Idaho Code § 63-2405 changed from denoting a tax "imposed on all gasoline received," to a tax "imposed upon the receipt of motor fuel in this state by any distributor." Despite the more specific language, about which the Commissioners make much ado, the *Goodman Oil* court had *already* interpreted the unamended statute as imposing a tax when the gasoline was received *by the fuel distributor, Goodman Oil,* 28 P.3d at 1002, so the legislative amendment offers no substantive shift in the analysis. Even more cosmetic are some of the remaining changes: In Idaho Code §§ 63-2401(1)-24, 63-2403, the words "gasoline" and "special fuels" were replaced by the more inclusive term, "motor fuel," and Idaho Code § 63-2405 and § 63-2406(3) were harmonized to indicate that the distributor no longer had to be "licensed" in order to be obligated to pay the tax and report it on the monthly distributor's report.

assessment of its effects, and the total circumstances germane to incidence. To determine where the legal incidence of the fuel tax fell in the old statutory scheme, the Supreme Court of Idaho used as its guide the United States Supreme Court's analysis of a "strikingly similar" statute in *Chickasaw Nation. Goodman Oil,* 28 P.3d at 1003. Critical to our analysis is our conclusion that the relevant operative provisions of the fuel tax that the state supreme court analyzed have not changed. We review them below and we also stress the similar provisions analyzed in the *Chickasaw Nation* case.

First, Idaho law still requires the non-tribal distributor who receives the motor fuel and sells it to the Indian tribes to pass on and to collect the tax from the retailer, and then to remit the taxes to the State.[9] Section 2435 declares that state fuel taxes are included in every taxable sale of gasoline made by a distributor and that upon receipt of payment by the distributor, an amount equal to the tax is money due the state, which the distributor holds in trust for payment to the state. Driving this point home,

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[9] Idaho Code § 63-2406(4) provides, in part, that "[a]ny distributor required to pay the tax imposed by this chapter who fails to pay such tax shall be liable to the commission for the amount of tax not remitted plus any applicable penalty or interest." Idaho Code § 63-2435 provides:

> When a distributor sells gasoline or aircraft engine fuel subject to tax under this chapter or a special fuels dealer sells special fuels subject to tax under this chapter, a portion of the receipts from those sales equal to the amount of tax required to be paid upon the fuels sold shall, immediately upon receipt by the distributor or special fuels dealer, be state money and shall be held in trust for the state of Idaho and for payment to the commission in the manner and at the times required by this chapter. This tax money shall not, for any purpose, be considered to be a part of the proceeds of the sale to which the tax relates. . . .

all invoices for sales by distributors to retailers must show that the state fuel tax was charged to the retailer. Idaho Admin. Code § 35.01.05.150.g.[10] Similarly, in *Chickasaw Nation* the Supreme Court noted that "Oklahoma's law requires fuel distributors to 'remit' the amount of tax due to the Tax Commission," 515 U.S. at 461, and held that where "[t]he import of the language and the structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel, the motor fuel taxes are legally imposed on the retailer rather than on the distributor or the consumer." *Id* at 462. (internal quotation marks omitted).[11]

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[10] Idaho Admin. Code § 35.01.05.150.01.g. provides:

> Price per gallon and total amount charged. When taxable motor fuels products are sold, at least one (1) of the following must be used to establish that the Idaho state fuel tax has been charged:
>
> i. The amount of Idaho state fuels tax;
>
> ii. The rate of Idaho state fuels tax; or
>
> iii. A statement that the Idaho state fuels tax is included in the price.

The Commissioners urge us to disregard this administrative rule, on the theory that its function is to safeguard customers who seek a refund and wish to prove that they have paid a tax. Although this might be an added benefit of the rule, we are persuaded that the rule lends support to the idea that distributors are required to pass on the tax to retailers.

[11] This unambiguous language from *Chickasaw Nation* defeats the Commissioners' argument that the provision describing the tax and remit scheme "says nothing relevant to who bears the tax's legal incidence." Further, although the Commissioners argue that the provision's purpose is only to protect the state's interest against judicial proceedings directed at the distributor's assets, the source of the funds the distributor collects – which are placed in trust for the state – is the tax that is assessed on and collected from the *retailers*. That is, the distributor never receives title to the state's share of the retailer's funds.

Second, as in *Chickasaw Nation,* the state statute in this case provides tax credits to the distributor for "collecting and remitting" the tax on behalf of the State. Idaho Code § 63-2407(4).[12] *See Chickasaw Nation,* 515 U.S. at 462 ("[F]or their services as agent of the state for [tax] collection, distributors retain a small portion of the taxes they collect.") (internal quotation marks and citations omitted). The Commissioners argue that getting a credit for the administrative costs attendant to collection and remittance of the motor fuels tax does not transform the statute into a "collect and remit scheme." The Commissioners argue that the provision accommodates the commercial reality that the tax will be passed through the distribution chain and embodies a legislative conclusion that public policy is furthered by allowing distributors to recover a portion of their administrative costs. We are not persuaded that the provision, by reflecting an economic reality, ceases to carry weight in our determination that the essence of the distributor's role is to collect from the tribal retailers on behalf of the state, and to remit the motor fuel tax moneys to the state. The Commissioners

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[12] Idaho Code § 63-2407(4) states, in relevant part:

> The number of gallons which would be equal to one percent (1%) of the total number of gallons received during the reporting period, less the total number of gallons deducted under subsections (1) through (3) of this section, *which credit is granted to the licensed distributor to reimburse him for the expense incurred on behalf of the state of Idaho in collecting and remitting motor fuel tax moneys,* maintaining necessary records for the state, preparing necessary reports and remittances in compliance with this chapter, and for loss from evaporation, handling, spillage and shrinkage, except losses caused by casualty as provided in subsection (3) of this section.

(emphasis added).

cite to no cases holding to the contrary. Further, the Supreme Court in *Chickasaw Nation* did not purport to ignore the economic reality of the deduction when it considered the deduction a factor supporting that the tax incidence lay impermissibly on the tribal retailers.

Third, Idaho gives tax credits to the distributor for fuel taxes that the distributor has paid but cannot then collect from the retailer.[13] For example, if the distributor receives one hundred gallons of motor fuel and sells only seventy gallons, the distributor receives a tax credit for the thirty unsold gallons. This squares with *Chickasaw Nation:* "[I]f the distributor remits the taxes it subsequently is unable to collect from the retailer, the distributor may deduct the uncollected amount from its future payments to the Tax Commission. The distributor, then, is no more than a transmittal agent for the taxes imposed on the retailer." *Chickasaw Nation,* 515 U.S. at 461-62 (internal quotation marks and citations omitted). The Commissioners urge us not to rely on this statutory provision. The Commissioners argue that the statutory provision giving the credit merely recognizes the economic reality that fuel taxes are passed through the commercial chain, and the credit mitigates the injury suffered by a distributor when it has paid taxes on fuel that it sells but

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[13] Idaho Code § 63-2407(6) provides:

> For sales made on or after July 1, 1995, taxes previously paid on gallons represented by accounts found to be worthless and actually charged-off for income tax purposes may be credited upon a subsequent payment of the tax provided in this chapter or, if no such tax is due, refunded. If such accounts are thereafter collected, the tax per gallon shall be paid based upon the amount actually received divided by the price per gallon of the original sale multiplied by the appropriate tax rate.

for which it is not paid. But we consider that this argument is of no moment, considering that the United States Supreme Court held in *Chickasaw Nation*, despite administrative justifications for the credit, that "[t]he inference that the tax obligation is legally the retailer's, not the distributor's" is supported by the deduction provisions for uncollected payments. *Id* at 461. *See also Goodman Oil*, 28 P.3d at 1003. This provision, taken together with the ones previously discussed, further underscores the "tax and remit" feature of the statute, which places the legal incidence on the retailers, not the distributors.

Fourth, Idaho law provides that the retailer has the right to any refund of fuel taxes sought by the distributor that the retailer has paid.[14] However, the retailers are neither allowed to set off their liability when *consumers* fail to make payments, nor are they compensated for their tax collection efforts. Further, the Idaho statute imposes the tax whether or not the fuel is ever sold to the Indian retailers' customers. So it is plain that the tax buck stops with the Indian tribal retailers. The Supreme Court in *Chickasaw Nation* noted similar points instructive to its conclusion that the incidence of the tax fell on the retailer: "No provision sets off the retailer's liability when consumers fail to make payments due; neither are retailers compensated for their tax collection efforts. And the tax imposed when a distributor sells fuel to a retailer applies

[14] Idaho Admin. Code § 35.01.05.180.02 states, in relevant part, that a distributor's claim for a refund "must include a statement that the amount refunded to the licensed fuel distributor has been, or will be, refunded by the fuel distributor to the purchaser [retailer], or that such motor fuel tax or transfer fee have never been collected from the purchaser [retailer]."

whether or not the fuel is ever purchased by a consumer." 515 U.S. at 462.

Because the Idaho tax statute's provisions mirror several of those present in, or conspicuously absent from, the statute at issue in *Chickasaw Nation,* and in light of the probable operational effects of the Idaho Motor Fuels Tax in its context, we hold that the legal incidence of this tax falls on the tribal retailers. We agree with the district court that "the statute retains the 'pass through' quality of the prior statute," and that it is still a "'collect and remit' scheme which places the incidence of the tax on the Indian retailers." *Hammond,* 224 F. Supp. 2d at 1270. Under federal law, it is unlawful to place the legal incidence of the tax on tribal retailers absent "clear congressional authorization" for the Idaho state taxation of the Tribes. *Chickasaw Nation,* 515 U.S. at 459.[15]

III

Having determined that the legal incidence of the tax falls on the Indians, we must address whether clear congressional authorization exists for imposing the tax. Here, we meet a preliminary issue at the threshold. The

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[15] Might one argue to the contrary that the incidence of the tax falls on the distributor if the distributor "receives" fuel, stores rather than sells it, and then is required by law to remit taxes to the state? We think not. The distributors who receive fuel in almost all cases plan and act to sell it. Even if a distributor were to hold inventory for a time, say to speculate on a pending price increase, in the ordinary course the gas later will be sold and the tax passed on to the retailer. Moreover, even if the point has partial validity in a case where a distributor buys to hoard rather than to sell, it does not undercut our conclusion that the statute's overall scheme places the legal incidence of the tax on the retailers.

Tribes argue in their cross-appeal that, in light of the Supreme Court of Idaho's ruling on the question in *Goodman Oil,* the Commissioners are collaterally estopped from re-litigating whether the Hayden-Cartwright Act abrogates tribal immunity from state taxation of motor fuel sales on Indian reservations.

We "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist.,* 465 U.S. 75, 81 (1984) (interpreting 28 U.S.C. § 1738). We ask whether the state of Idaho would give preclusive effect to the ruling against the Commission in *Goodman Oil.* The parties are not identical, but on the Idaho side they are closely related and in privity. In *Goodman Oil,* the defendant was the Idaho Tax Commission, and here the Defendants-Appellants are the Commissioners of that same commission. The Supreme Court of Idaho applies a five-factor test for assessing whether collateral estoppel bars re-litigation of an issue determined in a prior proceeding,[16] but it has abandoned the mutuality requirement as a prerequisite to the application of collateral estoppel. *See W. Indus. & Envtl. Servs., Inc. v. Kaldveer Assocs., Inc.,* 887 P.2d 1048, 1052 (Idaho

[16] As set forth in *Rodriguez v. Dep't of Correction*, 29 P.3d 401, 404 (Idaho 2001), the factors are:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

1994) ("We have . . . confirmed that the lack of mutuality of parties is not a bar to the application of collateral estoppel."). However, the Supreme Court of Idaho has never applied nonmutual offensive collateral estoppel against a *state* party on a question of *law*. Here, the defendant Commissioners, sued in their official capacity, are in substance a state party.

"'Offensive' collateral estoppel refers to the situation where the plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party." *Nat'l Med. Enters., Inc. v. Sullivan,* 916 F.2d 542, 545 n. 2 (9th Cir. 1990). Given the dearth of Idaho state precedent on the applicability of nonmutual offensive collateral estoppel against a state party, we look to general state law to divine the preclusive force of such judgments in this context, *see Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 375 (1996), and we look to the law as generally applied in other jurisdictions, *see Haring v. Prosise,* 462 U.S. 306, 314 (1983).

Absent clearly applicable state law governing the preclusive effect against the Commissioners, we are guided by the general law recited in the *Restatement (Second) of Judgments* § 29 (1982).[17] This section provides that the circumstances we consider include whether:

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[17] The Supreme Court of Idaho has declined to adopt the *Restatement* "categorically," but it "has consistently displayed its preference for selectively examining various sections and comments [of the *Restatement*] and thereafter adopting, citing favorably, or rejecting the provision, as the occasion warrants." *Diamond v. Farmers Group, Inc.,* 804 P.2d 319, 322 (Idaho 1990). Here, where we have found little state

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> (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based[.]

Further, considering whether to grant preclusive effect to a legal question is constrained in a case, like this one, where the party against whom collateral estoppel would be imposed is a government agency:

> [I]t is also pertinent that the party against whom the rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons. When any of these factors is present, the rule of preclusion should ordinarily be superseded by the less limiting principle of stare decisis.

Restatement (Second) of Judgements § 29 cmt. i, illus. 8 (1982).

Here, the Tribes seek to foreclose the state Commissioners on a *legal* question regarding the applicability of a federal law. We hesitate to give preclusive effect to the previous litigation of a question of law by estoppel against a state party when no state law precedent compels that we do so. By analogy, in *United States v. Mendoza,* 464 U.S. 154 (1984), the Supreme Court rejected a claim of collateral estoppel against the government. There, a Filipino national asserted a claim for naturalization based on a due process challenge to the United States's administration of the Nationality Act. Neither the district court nor the

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precedent on point, it is appropriate for us to assess the general state law, and on this the *Restatement* provision we cite is persuasive.

court of appeals reached the merits of the litigant's claims, because the courts held that the government "was collaterally estopped from litigating that constitutional issue in view of an earlier decision against the Government in a case brought by other Filipino nationals" in a United States district court.[18] *Id.* at 155. The Supreme Court unanimously reversed, holding that the government was situated differently from private parties for issue preclusion purposes:

> We have long recognized that the Government is not in a position identical to that of a private litigant, both because of the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates . . . [T]he government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity. . . . Government litigation frequently involves legal questions of substantial public importance. . . . Because of those facts the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.

Id. at 159-60 (internal quotation marks and citations omitted). The Supreme Court expressed concern that by estoppel against the government the development of the law would be stunted: "A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Id.* at 160. *Accord Sullivan,* 916

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[18] The government had not appealed the adverse ruling.

F.2d at 545 (noting "the well-established rule that nonmutual offensive collateral estoppel cannot be asserted against the government.").

The same considerations that counsel against applying nonmutual offensive collateral estoppel against the United States government on questions of law apply to precluding the Idaho Tax Commission from re-litigating the issue whether the Hayden-Cartwright Act applies to Indian reservations. This state agency might be called on to litigate often and in multiple fora against diverse litigants about questions of law with broad import. Rather than risk that an important legal issue is inadequately considered because of the "freezing effect" against which the *Mendoza* court warned, we consider anew the question whether the Hayden-Cartwright Act has authorized the state of Idaho to tax tribal retailers on the motor fuel delivered to the Tribes' reservations.

IV

The Commissioners contend that if we determine that the legal incidence of the tax fall on the Indians, as we have now held, the Tribes cannot challenge the tax because Congress, by enacting the Hayden-Cartwright Act, has authorized states to impose the motor fuel tax on Indians. However, we cannot hold that Congress has authorized state taxation of Indians or Indian reservations unless we determine that Congress has "made its intention to do so unmistakably clear." *Blackfeet,* 471 U.S. at 765; *see also Chickasaw Nation,* 515 U.S. 459 ("If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization."); *Prairie Band*

Potawatomi Nation v. Richards, 241 F. Supp. 2d 1295, 1304. (D. Kan. 2003) ("Unless Congress makes it abundantly clear that it intends to grant taxing authority to the states, [we] must construe the statute as not allowing the taxation of Indians.").[19] Stated another way, we cannot find an implied waiver of sovereign immunity if the language, structure, and legislative history of the statute are ambiguous as to the scope of Congress's intent.

A

The question whether the Hayden-Cartwright Act reaches Indian reservations is one of first impression for our Circuit. The Eighth Circuit, every federal district court, and every state court to address the issue thus far has held that clear congressional authorization under the Hayden-Cartwright Act is not present, rejecting states' attempts to tax Indians for motor fuel delivered and sold on their own reservations.[20] *See Marty Indian School Bd. v.*

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[19] The "unmistakably clear" standard in this context mirrors that which the States enjoy in the Eleventh Amendment context. *See, e.g., Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985) ("Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself."); *Oregon v. Ashcroft,* 368 F.3d 1118, 1125 (9th Cir. 2004).

[20] On two occasions, the Supreme Court has declined to address explicitly whether this is the correct interpretation of the Hayden-Cartwright Act. *See Chickasaw Nation,* 515 U.S. at 456-57 ("We decline to address this question of statutory interpretation" about whether "United States military or other reservations" includes "Indian reservations," because the government argued the point for the first time in its brief to the Supreme Court); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 151 n. 16 (1980) ("We need not reach the more general question whether the Hayden-Cartwright Act applies to Indian reservations at all."). Absent definitive guidance from the Supreme Court, we must decide this issue.

South Dakota, 824 F.2d 684, 688 (8th Cir. 1987) ("[W]e agree with the district court's determination that section 104 [of the Hayden-Cartwright Act] does not support the imposition of the state's motor fuel tax on the Marty Indian School."); *Winnebago Tribe of Nebraska v. Kline,* 297 F. Supp. 2d 1291, 1304 (D. Kan. 2004) (noting the ambiguity of the Act's language, and holding that the Hayden-Cartwright Act does not bar plaintiff's request for relief from state collection of fuel taxes); *Richards,* 241 F. Supp. 2d at 1307 ("Interpreting ambiguities in the Act in favor of the Tribe, the Court finds that the language of the Act does not show that Congress consented to taxation of the Indian reservations. . . . Congress must be explicit if it intends to grant states the power to tax within Indian country, and . . . the Court finds Hayden-Cartwright does not provide for an explicit grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations[.]"); *Pourier v. South Dakota Dep't of Revenue,* 658 N.W. 2d 395, 399 (S.D. 2004), *cert. denied,* ___U.S.___ (May 24, 2004) ("The language of the statute does not make Congress' intention to allow such taxation 'unmistakably clear.'"), *vacated, in part, on other grounds by* 674 N.W. 2d 314; *Goodman Oil,* 28 P.3d at 1001-02 (holding that the Hayden-Cartwright Act does not apply to Indian reservations, and that the state's tax was therefore unconstitutional as applied to Indians), *cert. denied,* 534 U.S. 1129 (2002).[21]

[21] *But see In re State Motor Fuel Tax Liab. of A.G.E. Corp.,* 273 N.W. 2d 737, 739 (S.D. 1978) (holding that an Indian reservation was a federal area subject to the Hayden-Cartwright Act, but analyzing the tax as levied on a *non-Indian* contractor doing work for the Bureau of Indian Affairs on tribal land.).

We agree with these courts' conclusions. Because the Eighth Circuit is the only circuit to have decided this issue, and because its discussion did not address the arguments presented by the Commissioners to us, we will review and analyze the issue in more detail.

B

We are mindful of the federal government's trust relationship with the Indian Nations, which generally is inconsistent with permitting state taxation of those sovereign Indian Nations where Congress has not so directed: "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . , and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Blackfeet,* 471 U.S. at 764 (internal citations omitted).[22] As the Supreme Court held in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* "[a]bsent cession of jurisdiction or other federal statutes permitting its . . . a State is without power to tax reservation lands and reservation Indians." 502 U.S. 251, 258 (1992) (internal quotation marks omitted). The United States Supreme Court has held that Congress cannot be said to have abrogated tribes' sovereignty, giving exception to the rule

[22] Our nation's aversion to state taxation of Indians is deep-rooted. As Judge William C. Canby explains in his helpful and scholarly book on Indian law, Congress required that several western states include in their constitutions, as a condition of their admission into the Union, a prohibition against taxing Indian trust lands. William C. Canby, Jr., *American Indian Law in a Nutshell* 264 (4th ed. 2004).

that "Indian tribes and individuals generally are exempt from state taxation within their own territory," unless Congress has "made its intention to do so unmistakably clear." *Blackfeet,* 471 U.S. at 764-65.

The Commissioners argue that this canon of statutory construction from the Indian context does not apply to this case, because the Hayden-Cartwright Act is a law of general, not specific, applicability. To aid its argument, the Commissioners cite *Fed. Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960), which stated that "a general statute in terms applying to all persons [such as the Federal Power Act] includes Indians and their property interests." But this argument misses the preliminary point of statutory interpretation; we must decide whether Section 10 of the Hayden-Cartwright Act gives a general command permitting state taxation of motor fuel sold to filling stations on Indian reservations.

C

We begin our analysis of the Hayden-Cartwright Act by examining the plain meaning of the statute's language.[23] *Wilderness Soc'y v. United States Fish & Wildlife Servs.,* 353 F.3d 1051, 1060 (9th Cir. 2003), amended by 360 F.3d 1374 (9th Cir. 2004). We also analyze the structure of the statute to inform our contextual analysis of its key words. *Castillo v. United States,* 530 U.S. 120, 124 (2000). Finally, because we conclude that the language of the Hayden-Cartwright Act is ambiguous, we determine

[23] The text is set out in Section I, *infra.*

its scope with reference to its legislative history. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 587 (1977).

The Commissioners argue that the words of the Hayden-Cartwright Act, which allow states to impose a motor fuels tax when the fuel is sold on "United States military or other reservations, when such fuels are not for the exclusive use of the United States," 4 U.S.C. § 104, include Indian reservations. The Tribes, on the other hand, contend that the Hayden-Cartwright Act's language is not specific enough to extend to Indians. We agree with the Tribes.

Although the term "reservation" is commonly used when referring to Indian reservations, the word has a broader reach and is ambiguous in this context. As the district court noted, reservations include "military bases, national parks and monuments, wildlife refuges, and federal property." *Hammond,* 224 F. Supp. 2d at 1269. The Supreme Court similarly observed in *United States v. Celestine,* 215 U.S. 278, 285 (1909), that "[t]he word [reservation] is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose."[24] The intent of Congress in authorizing taxes on fuel delivered to United States "reservations, in a statutory section that does not refer at all to Indians, Indian tribes, or Indian reservations," cannot be said to mean that states have been unmistakably authorized to impose taxes on deliveries to tribal gas stations within

[24] The Commissioners make much of the *Celestine* court's observation that the term "reservation" may include "Indian reservation," but we do not find this a determinative statement in light of the Supreme Court's acknowledgment, in the same case, that "a reservation is not necessarily 'Indian Country.'" *Celestine,* 215 U.S. at 285.

Indian reservations. There is no unmistakably clear congressional authorization for such a tax. *See Chickasaw Nation,* 515 U.S. at 459; *Blackfeet,* 471 U.S. at 765.

The Commissioners argue to the contrary, relying upon the Hayden-Cartwright Act's specification that the tax authority may levy the tax only when sold "by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, *licensed traders,* and other similar agencies." 4 U.S.C. § 104(a) (emphasis added). The Commissioners contend that the term "licensed trader" has been used to refer to traders subject to licensure under the Indian trader statutes. *See, e.g., Warren Trading Post Co. v. Arizona State Tax Comm'n,* 380 U.S. 685, 688 (1965). The Commissioners urge that "[i]t makes no sense to conclude that Congress used the terms 'reservations' and 'licensed trader' in the same statutory provision without recognition of their reach into Indian country."

We are not persuaded. Congress, in using the term "licensed trader," could have meant that the state tax may be assessed on non-Indian traders licensed to conduct business on *any* federal reservation subject to the Hayden-Cartwright Act. Even if to a degree, "licensed traders" may be associated with Indian reservations, the Act does not necessarily suggest that the tax could be imposed on Indian tribes, as opposed to on non-Indian traders licensed to do business on Indian reservations. For example, in *In re State Motor Fuel Tax Liab. of A.G.E. Corp.,* 273 N.W. 2d 737 (S.D. 1978), the Supreme Court of South Dakota held that the Hayden-Cartwright Act granted states "limited jurisdiction" to tax a non-Indian corporation engaged in highway construction on an Indian reservation. The

phrase "licensed trader" does not make unmistakably clear a congressional intent to authorize states to tax deliveries to tribal entities on Indian reservations.

Our assessment of the structure of the Hayden-Cartwright Act also leads us to reject the Commissioners' arguments. "[I]t is also a fundamental canon [of statutory construction] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Wilderness Soc'y,* 353 F.3d at 1060 (internal quotation marks omitted). The Hayden-Cartwright Act was first enacted in 1936 to amend the Federal Highway Act (Act of June 16, 1936, ch. 582, § 10, 49 Stat. 1519, Pub. L. No. 74-686).[25] The word "reservation" appears four times in the Hayden-Cartwright Act: (1) section three designates monies for the construction and maintenance of "main roads through unappropriated or unreserved public lands, non-taxable Indian lands, or other Federal reservations other than the forest reservations." *Id.* § 3; (2) section five applies to funds used to construct and maintain roads through "public lands, national forests, or other Federal reservations" to access national parks and monuments. *Id.* § 5; (3) section six allocates funds for construction and improvement of "Indian reservation roads." *Id.* § 6; and (4) section ten, at issue in this case, refers to "United States military or other reservations." *Id.* § 10. Had Congress intended in § 10 that "United States military or other reservations"

[25] *See infra* for further discussion of the legislative history of the Act.

include Indian reservations, it could have made it clear. But Congress did not do so.[26]

Because the statute's terms are ambiguous in their context, it is not inappropriate to also consider legislative history. Congress passed the Hayden-Cartwright Act in 1936 as a floor amendment to the Federal Highway Act of 1936, which was designed to fund the extension of highway construction and maintenance. *Pourier,* 658 N.W. 2d at 402. The Act was in part a response to a Supreme Court decision, *Standard Oil Co. v. California,* 291 U.S. 242 (1934), which had invalidated a state license tax on a company distributing gasoline to a post exchange within the Presidio of San Francisco, a military reservation. The purpose of the Act was to stop motorists from avoiding state taxes by buying gas at such locations; it resulted from a "complaint in many parts of the country about the inability of the States to collect revenue on gasoline sold on Government reservations not for governmental use." 80 Cong. Rec. 6913 (May 8, 1936) (statement by Sen. Hayden). As the *Potawatomi* court observed, "The legislative history discussing the purpose of the Act never specifically refers to Indian reservations." 241 F. Supp. 2d at 1306.

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[26] As one commentator familiar with the *Goodman Oil* litigation has said:

> The intentional use of the modifier "Indian" in two of the four references to the word "reservation" shows that Congress was aware of the potential applicability of the Act to Indian reservations. If Congress wanted to override the tribal exemption, it had the awareness and ability to do so by specifically designating Indian reservations within the language of section 10.

Karen Spinola, *The Road Less Traveled – Implications of the Goodman Oil Decision,* 38 Idaho L. Rev. 637, 648 (2002).

Nowhere in the legislative history is it made clear that Congress intended the Act to apply to Indians or that Congress made manifest its unmistakably clear intent to abrogate Indian sovereign immunity. *See Pourier,* 658 N.W. 2d at 402-403.[27]

The Commissioners argue that the Act was passed to allow states to earn needed revenues to build and maintain roads throughout the state, including on Indian reservations. However, we share the *Goodman Oil* court's skepticism of assigning this legislative purpose to Indian reservation roads, in light of the fact that "Congress had already passed legislation authorizing appropriation of funds for survey, improvement, construction, and maintenance of Indian reservation roads." 28 P.3d at 1000.[28]

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[27] Section 10 of the Act was not even part of the original legislation, and it passed without any debate as to its language. 38 Idaho L. Rev. at 650-51.

[28] The Commissioners urge that we defer to two early executive branch interpretations of the Hayden-Cartwright Act that the Commissioners argue construed "United States military or other reservations" to include Indian reservations. *See Application of Federal and State Sales Taxes to Activities of Menominee Indian Mills,* 57 I.D. 129, 138-39 (1940) (concluding that "United States military or other reservations" were meant to include Indian reservations, but still maintaining that "[i]t is not clear . . . whether the Government agencies specified [in the Act] are intended to include such a Federal agency as the Menominee tribal enterprise *and whether the reference to reservations includes Indian reservations.*") (emphasis added); *Taxation by States of Motor-Vehicle Fuel Sold in National Parks,* 38 Op. Att'y Gen. 522, 524 (1936) ("It is true that some of the agencies which are expressly designated in Section 10 *apparently* are such as usually pertain to military, naval, or Indian reservations[.]") (emphasis added).

Relying on *Lorillard v. Pons,* 434 U.S. 575, 580 (1978), the Commissioners argue that because Congress did not amend the statute in light of these two opinions, we can assume that Congress agreed with the interpretations about the abrogation of Indian tax immunity.

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D

Were we to hold that Congress intended Indians to be subject to the Hayden-Cartwright Act, we would be required to make two leaps: first, that Congress meant "United States military or other reservations" to apply to Indian reservations without stating so specifically, and second, that Congress meant without saying so to abrogate the *Tribes'* sovereign immunity from taxation. *Bryan v. Itasca County,* 426 U.S. 373, 381 (1976) ("[S]ome mention [of the abrogation of tribal immunity] would normally be expected if such a sweeping change in the statute of tribal government and reservation Indians had been contemplated by Congress."). In passing the Hayden-Cartwright Act, Congress effectively waived the *federal* government's sovereign immunity from state tax collection. We cannot conclude that Congress's explicit concession permitting states to tax federal government reservations on motor fuel deliveries *also* embodied an implied vitiation of Indians' sovereignty. Given the standard for finding that Congress has authorized states by taxation to intrude on the sovereignty of Indian tribes, which requires that the showing of congressional intent be "unmistakably clear," and analyzing the Hayden-Cartwright Act's text, structure, and legislative history in this light, we conclude that Congress did not abrogate the Tribes' immunity from state

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However, the agency interpretations underscore the ambiguity, not the clarity, of the executive branch's statements insofar as they speak to the applicability of the Act to Indian reservations. Also, the United States today no longer holds the position that the Commissioners contend the United States held in the 1930s and '40s. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 20-24, *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450 (1995) (No. 94-771).

taxation of fuels delivered to and sold on their reservations.

V

We determine as a matter of federal law that notwithstanding the Idaho legislature's attempt to assign the legal incidence of the motor fuels tax to the distributors, the tax's legal incidence falls on tribal retailers, not on the non-tribal distributors who act as transmittal agents for the state. Moreover, this tax is impermissible because Congress did not, in enacting the Hayden-Cartwright Act in 1936, provide the "unmistakably clear" authorization necessary to abrogate Indian tax immunities on the Tribes' reservations. *Blackfeet,* 471 U.S. at 765.

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In my view, the Hayden-Cartwright Act expressly authorizes the tax at issue because it permits the state to impose the tax regardless of its incidence. The Act renders unnecessary the majority's highly indeterminate analysis of where the incidence of the tax falls.

That Act generally enables states to tax sales of fuel by or through "filling stations [and] licensed traders . . . located on United States military or other reservations."[1]

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[1] "All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases,

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If "military or other reservations" includes Indian reservations, the Act authorizes the tax. The Supreme Court identified the precise issue of whether "reservations" includes Indian reservations, and expressly avoided resolving it.[2] I would now answer that question in the affirmative.

There are two reasons that Indian reservations are "reservations" for purposes of the statute. First, it says so. It explicitly covers "reservations" and does not limit its coverage to military reservations. Black's Law Dictionary defines "reservation" as "[a] tract of public land set aside for a special purpose; esp., a tract of land set aside for use by an American Indian tribe."[3] The Supreme Court says that "[t]he word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose," such as "a military reservation, or an Indian reservation."[4] Except for lawyers, few people

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storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located." 4 U.S.C. § 104(a).

[2] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n. 16 (1980). *White Mountain* also points out that the special position of tribes, under current jurisprudence, is "not as nations." *Id.* at 142. The majority opinion nevertheless denotes the tribes as "Nations," perhaps intending to accord the tribes a sovereign status less defeasible by Congress than current jurisprudence allows.

[3] Black's Law Dictionary 1309 (7th ed. 1999).

[4] *United States v. Celestine*, 215 U.S. 278, 285 (1909).

even know that what they call military "bases" are called military "reservations" in federal land law parlance. The word "reservation" ordinarily means and is most often used to mean Indian reservations. If the statute meant to make an exception to its "reservations" coverage for Indian reservations, it would have said "except for Indian reservations." The Justice Department since 1936, and the Interior Department since 1940, have understood the Hayden-Cartwright Act to apply to Indian reservations.[5] This settled administrative interpretation ought to be given some deference.

Second, if anyone were to have any question whether Congress was speaking about, and considered, Indian reservations, the question would be answered by its express coverage of "licensed traders." Ordinarily one can operate a grocery store or a hardware store, or engage in other trades, without a license. The term "licensed trader" in federal statutes means one and only one thing: a person with a federal license to trade on an Indian reservation. Thus, it is "unmistakably clear"[6] that the Hayden-Cartwright Act expressly allows states to levy taxes on fuel sold on Indian reservations.

That is not to say that sales of gasoline to Indian tribes can be taxed under the statute. That may be a different question, one not raised by the parties in this case. Sales on reservations are not necessarily the same thing as sales to Indians or Indian tribes. Sales on

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[5] *See Taxation by States of Motor-vehicle Fuels Sold in National Parks,* 38 U.S. Op. Att'y Gen. 522 (1936); *Application of Federal and State Sales Taxes to Activities of Menominee Indian Mills,* 57 Interior Dec. 129 (1940).

[6] *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 765 (1985).

reservations, but not to Indians, may be sales to non-Indians who drive to the reservation to get a bargain on untaxed gasoline. Whether Congress ought to provide for revenue and jobs to Indians on reservations by enabling them to sell untaxed gasoline, or whether it should provide for protection of state revenue from gasoline taxes by preventing Indian tribes from operating untaxed islands within states, are policy questions that may be answered either way. Congress has answered them and can change its answer. We have no say. The only question for us is whether the policy question was resolved by the Hayden-Cartwright Act. The words of the Act clearly do resolve it, in favor of the states.

A little reflection on why Indian reservations are called "reservations" would help to avoid confusion. From the 1780s, when the Articles of Confederation government enacted the Northwest Ordinance and its predecessors,[7] to 1986, when the Homestead Act repeal became effective in Alaska,[8] national policy on federally owned lands was to sell them cheap or give them away, rather than to hold on to them or charter them to great companies as England and Spain had. Once the southern states seceded, thereby losing control over the Senate (the South had traditionally opposed free land for ordinary farmers in the territories, because the small parcels would be incompatible with the economics of slavery), Republicans were able to enact the

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[7] *See* Robert E. Reigel & Robert G. Athearn, *America Moves West* 81, 88-89 (1964).

[8] Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702 (repealing laws related to homesteading, with the exception of those that applied to public lands in Alaska, which were to sunset ten years later).

Homestead Act of 1862, turning squatters into landowners.[9] Though free land doubtless contributed to democracy, it was democracy that caused the government to adopt a policy of free land.

About all one had to do to get title to 160 acres of land under the Homestead Act was to occupy the land and improve it.[10] With so liberal a policy of giving away the public domain, the government needed a means to mark out some portions that would not be turned into farms, mines, homesites, trade sites, and all the other categories of private ownership. Under the Northwest Ordinance and its Jeffersonian predecessor, land was to be reserved from sale (giving away land for free was Lincoln's subsequent innovation under the Homestead Act[11] for such purposes as schools and transfer to Revolutionary War veterans.[12] Likewise, under the Morrill Land-Grant Act of 1862, lands were reserved from entry for various public purposes, such as schools.[13] Beginning in 1872 with Yellowstone, reservations from entry were made for parks.[14]

From the beginning of our nation, no public purpose for reserving lands from sale or entry was more important than reservations for the Indians, in the early days because of their military threat to the new republic, and

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[9] Ray Allen Billington, *Westward Expansion: A History of the American Frontier* 611-12 (1967).

[10] Reigel & Athearn, *supra* note 7, at 420-21.

[11] Riegel & Athearn, *supra* note 7, at 420.

[12] Billington, *supra* note 9, at 216.

[13] *Id.* at 702; Lawrence M. Friedman, *A History of American Law* 417 (1985).

[14] Friedman, *supra* note 13, at 419.

subsequently as a matter of national honor.[15] As Felix Cohen put it, the most common Indian reservation legislation "is that which *reserves* a portion of the public domain from entry or sale and dedicates the reserved area to Indian use."[16] It would be highly inconvenient for the government as well as the Indians if squatters or purchasers took lands from the Indians. In the early days, that risked embroiling the government in Indian wars. Likewise it would be inconvenient if military bases could become squatters' homesteads. So both have been reserved from entry, and called "reservations" for that reason, since the earliest days of the Republic.

If there were any ambiguity in the Hayden-Cartwright Act reference to "reservations," which there is not, it would be cured decisively by the Act's reference to "licensed traders." The only federally "licensed traders" that exist, the only persons to whom the phrase applies, are those who trade with Indians in Indian country.[17] The majority suggests that the phrase could refer to "non-Indian traders licensed to conduct business on *any* federal reservation,"[18] but there is no instance of the phrase "licensed trader" used in federal law outside of trade with Indians. Traders on Indian reservations have always needed federal licenses. Before we were even the United States, colonial governments licensed traders dealing with the Indian

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[15] Billington, *supra* note 9, at 703.

[16] *Felix Cohen's Book of Federal Indian Law* 296 (photo. reprint 1942) (1986) (emphasis in original).

[17] 25 U.S.C. § 261 et seq.; 25 C.F.R. 140.1 – 140.26 (licensed Indian traders).

[18] Maj. Op. at 11624.

tribes.[19] "In the very first volume of the federal statutes is found an Act, passed in 1790 by the first Congress, 'to regulate trade and intercourse with the Indian tribes,' requiring that Indian traders obtain a license from a federal official, and specifying in detail the conditions on which such licenses would be granted."[20]

Generally, it has been illegal for anyone but an Indian to live in Indian country or on an Indian reservation as a trader without a license, on pain of fine and forfeiture of all trade goods.[21] The purposes of licensing Indian traders have been obvious from the legal restrictions imposed from time to time on their trade: preventing sales to Indians in Indian country of whiskey and of means for making war, and protecting the Indians from exploitation.[22] Federal law still provides, with various exceptions and limitations, that "[a]ny person other than an Indian of the full blood who shall attempt to reside in the Indian country, or to trade therein, or on any Indian reservation as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover be liable to a penalty of $500." 25 U.S.C. § 264.

Without federal legislation to the contrary, such as the Act we are construing, these licensed traders cannot be taxed by the states.[24] "[F]rom the very first days of our

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[19] Cohen, *supra* note 16, at 348.

[20] *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 688 (1965) (quoting Act of July 22, 1790, 1 Stat. 137).

[21] Cohen, *supra* note 16, at 349.

[22] *Id.* at 349-50.

[24] *Warren Trading Post*, 380 U.S. at 690.

government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes."[25] *Warren Trading Post* holds that assessment and collection of a state tax on gross proceeds of the Indian trader "would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress."[26]

The Hayden-Cartwright Act is just such an act of Congress, and its inclusion of "licensed traders" can mean only one thing, that Congress was acting pursuant to the "as authorized by Acts of Congress" language under *Warren Trading Post*. Since "licensed traders" is a phrase with only one meaning, persons licensed to trade on Indian reservations, Congress necessarily meant the unambiguous word "reservations" to apply, as it ordinarily does, to Indian reservations.

The only circuit authority the majority cites, *Marty Indian School Board v. South Dakota*,[27] is not on point. There the tax was on fuel purchased by an Indian school, and the Eighth Circuit decided the issue on preemption grounds, primarily relying on *White Mountain Apache Tribe*.[28] The Hayden-Cartwright Act was distinguished in

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[25] *Id.* at 686-87.

[26] *Id.* at 691.

[27] *Marty Indian Sch. Bd. v. South Dakota*, 824 F.2d 684 (8th Cir. 1987).

[28] *Id.* at 686-88 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1979) (holding that federal regulation of timber

(Continued on following page)

an offhand remark at the end of the decision.[29] *Marty Indian School Board* would be relevant authority if the question before us were state tax on fuel sold to an Indian school or tribe, but it is not.

The language of the Hayden-Cartwright Act is "unmistakably clear," to the effect that "reservations" includes Indian reservations. The express application of the Act to "licensed traders," which is to say, Indian traders on Indian reservations, eliminates any room for argument about what Congress said. About the only argument I can think for the Act not being "unmistakably clear" is that the majority today makes a mistake. That logical amusement is not a sufficient reason to set aside the plain and express decision of Congress.

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preempted a state tax that would fall on the tribe and interfere with the congressional purpose of funding tribal government with timber sales)).

[29] *Id.* at 688.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

COEUR D'ALENE TRIBE, Plaintiff, v. DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, Defendants.	CASE NO. CIV 02-185-S-BLW AMENDED ORDER GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND A PERMANENT INJUNCTION AND DENYING DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT [Amended as to page 11, line 5] **(Filed August 23, 2002)**
NEZ PERCE TRIBE Plaintiff, v. DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, Defendants.	
SHOSHONE BANNOCK, Plaintiff, v. DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, Defendants.	

Before the Court is Plaintiff Coeur D'Alene Tribe's motions for partial summary judgment and preliminary

and permanent injunctions, Plaintiff Nez Perce Tribe's motions for summary judgment and permanent injunctions, and Defendants motions to dismiss and for summary judgment. After reviewing the moving, opposing, and replying papers, after oral argument on June 28, 2002, and for the reasons set forth below, the Court GRANTS Plaintiffs' motions and DENIES Defendants' motions.

I.

BACKGROUND

Plaintiffs in these consolidated cases are Indian Tribes, each with a governing body recognized by the Secretary of the Interior. The tribes are authorized to impose taxes on property within the tribes' jurisdiction. As part of their governmental and entrepreneurial activities, the tribes own various retail gasoline stations on tribal reservations located within the state of Idaho. Additionally, there are at least two gas stations owned by tribal members on the Coeur D'Alene reservation.

The primary distributor of gasoline to the tribes was originally Goodman Oil Co. For several years, the state of Idaho imposed a 25 cent motor fuels tax on all motor fuel delivered to the tribes' retail gasoline stations within the borders of the tribes' reservations. The tribes' fuel distributor collected the motor fuels tax and remitted it to the Idaho State Tax Commission (Commission). On August 26, 1999, the Idaho District Court held that the Commission lacked the authority to collect the state motor fuel tax from distributors selling fuel to Indian reservations. On June 8, 2001, the Idaho Supreme Court affirmed that decision. *Goodman Oil Co. v. Idaho State Tax Comm'n,* 28 P.2d 996 (Idaho 2001), *cert. denied,* 122 S. Ct. 1068 (2002).

The Idaho Supreme Court reached two critical conclusions in that case. First, the Hayden-Cartwright Act, 4 U.S.C. § 104,[1] did not confer on the state the authority to impose a gasoline tax on gasoline sold on Indian tribes. *Goodman*, 28 P.2d at 1002. Second, the incidence of the state motor fuels tax, Idaho Code §§ 63-2401 *et seq.* and 41-4901 *et seq.*, fell on the Indian tribes.

After the Idaho Supreme Court's ruling, the tribes enacted fuel taxes on gas sold on the tribal reservations for use to improve and maintain roads on the tribal reservations.[2] On March 22, 2002, the Idaho state legislature passed a new motor fuel tax, which the Governor signed on March 23, 2002. The legislature declared that the purpose of the new law was to place the incidence of the tax on the fuel distributors, not the tribes, so as to circumvent the ruling in *Goodman*. The Commission then began requiring City Service, Inc. of Kalispell (City Service), the tribes' new gasoline distributor, to collect and remit the gasoline tax.

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[1] The Hayden-Cartwright Act provides, in part:

> All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship services stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States.

4 U.S.C. § 104.

[2] The Coeur D'Alene tribe imposed a 25 cent per gallon tax, the same as the Idaho state fuel tax. The Nez Perce Tribe imposed a 15 cent tax.

The tribes brought this suit to enjoin Defendants, as members of the Commission, from collecting the motor fuel tax. Because of the identity of the issues, the Court consolidated these cases. Plaintiffs now move for partial summary judgment and for a permanent injunction. Defendants bring counter-motions to dismiss and for summary judgment. The entire case is now before the Court.

II.

LEGAL STANDARDS

A. Summary Judgment

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The Court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962). However, the existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; to defeat the motion, the non-moving party must affirmatively set forth facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2510 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. *Id.* at 256, 106 S. Ct. at 2514. When the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of

evidence of a genuine issue of material fact from the non-moving party. *Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir. 1990). The moving party need not disprove the other party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S. Ct. 2548, 2553-54 (1986).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." *Anderson,* 477 U.S. at 252, 106 S. Ct. at 2512.

B. Permanent Injunction

Generally, courts grant equitable relief in the event of irreparable injury and the inadequacy of legal remedies. *See Stanley v. Univ. of S. Cal.,* 13 F.3d 1313, 1320 (9th Cir. 1994). When a plaintiff's constitutional rights are violated, there is a presumption of irreparable harm. An injunction is therefore the appropriate remedy for a constitutional violation.

III.

DISCUSSION

"The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . ,

and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana v. Blackfeet Tribe,* 471 U.S. 759, 764 105 S. Ct. 2399, 2402 (1985). A state may not levy a tax on an Indian tribe or on members of a tribe inside Indian country without express approval of Congress. *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458, 115 S. Ct. 2214, 2220 (1995). The critical question is therefore who bears the legal incidence of the tax. *Id.* "If the legal incidence of an excise tax rests on a tribe or tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.*

The critical questions for the Court is whether there is a congressional authorization to impose a tax on Indians and whether Idaho's amended motor fuel tax places the incidence of the tax on the tribes.

A. Congressional Authority to Tax

Defendants argue that the Hayden-Cartwright Act provides authority for the state to impose a motor fuel tax on Indians. The United States Supreme Court has twice explicitly refused to address this question. In *Oklahoma Tax Commission,* 515 U.S. at 456-57, 115 S. Ct. at 2219, the Supreme Court was faced with the question of whether the state of Oklahoma could impose its motor fuels tax on Indians. Oklahoma asserted that the tax was specifically authorized by Congress in the Hayden-Cartwright Act. *Id.* The Supreme Court refused to entertain the argument because the state raised the issue for the first time in its

brief on the merits. *Id.* The Supreme Court then went on to hold that the incidence of the Oklahoma tax fell on the Indians and it was therefore barred. *Id.* at 467, 115 S. Ct. at 2224.

In *Goodman Oil,* the issue was placed squarely before the Idaho Supreme Court, which determined that the Idaho tax was not authorized by the Hayden-Cartwright Act, and the state motor fuels tax which placed the incidence of the tax on Indians was barred by the federal Constitution. 28 P.2d at 996. The state sought a writ of certiorari from the United States Supreme Court, which the Court denied. *Idaho State Tax Comm'n v. Goodman Oil Co.,* 122 S. Ct. 1068 (2002). Thus, even though the issue was squarely before the Court, it declined to resolve the question. It therefore let stand the Idaho Supreme Court's decision that the state tax was unconstitutional as applied to Indians.

Because neither of these rulings bind this Court on the issue of whether the Hayden-Cartwright Act allows states to impose a motor fuels tax on Indians, the Court must examine the merits of the issue independently.[3] Nevertheless, the Court holds that the Hayden-Cartwright Act is not a congressional authorization to impose a motor fuels tax on Indians.

Initially, the Court must recognize the unique trust relationship that exists between the United States and the Indian Nations. *Oneida County v. Oneida Indian Nation,*

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[3] Plaintiffs contend that the Commissioners are collaterally estopped from arguing the Hayden-Cartwright Act allows states to impose a motor fuels tax on Indians. This, however, is a question of law, and collateral estoppel applies only to questions of fact.

470 U.S. 226, 247, 105 S. Ct. 1245, 1258 (1985). Statutes affecting Indians are therefore to be construed broadly, with any ambiguous provision to be interpreted to their benefit. *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174, 93 S. Ct. 1257, 1263 (1973). Thus, unless Congress has been explicit in granting states authority to tax Indians, the Court should construe the statute as not allowing the taxation. Defendants, however, argue that these cannons of interpretation do not apply to laws of general applicability. In *McClanahan,* 411 U.S. at 174, 93 S. Ct. at 1263, however, the Court applied these same cannons in holding that Indians living and working on Indian reservations were not subject to state income taxes.

The Hayden-Cartwright Act is not specific enough to authorize a motor fuels tax on Indian gas stations located in Indian Country. Defendants contend that the Act's language, which allows the imposition of a state motor fuels tax when the fuel is sold on "United States military or other reservations, when such fuels are not for the exclusive use of the United States," 4 U.S.C. § 104, includes Indian Reservations. Although Indian Reservations might come to mind when discussing reservations, the term "reservation" has a much broader meaning. "The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose." *United States v. Celestine,* 215 U.S. 278, 285, 30 S. Ct. 93, 95 (1909). A reservation includes military bases, national parks and monuments, wildlife refuges, and federal property. Although Indian country might be included in that, given the trust relationship that exists between the United States and Indian nations, Congress

must be more explicit if it intends to allow states to tax Indians.

Furthermore, the types of reservations referred to in the Hayden-Cartwright Act do not appear to be the same as Indian Reservations. By allowing states to impose motor fuels taxes on gas sold on United States Military Reservations, Congress was waiving the federal government's sovereign immunity to tax collections by state agencies. *Cf. M'Culloch v. Maryland,* 17 U.S. (4 Wheat) 316, 328 (1819) ("An unlimited power to tax involves, necessarily, a power to destroy.") But simply because Congress was willing to give up (to a limited extent) the federal government's exemption from state motor fuels taxes does not mean that Congress was willing to do the same for Indians.[4]

Members of Congress appear to recognize that more explicit language is required. Congress has had before it two bills in recent years to allow state taxation of fuel sales on Indian reservations. *See* H.R. 3966, 105th Cong. (1998); S. 550, 106th Cong. (1999). Even in face of the Idaho Supreme Court's decision in *Goodman Oil,* Congress has not created a specific authorization for states to tax motor fuels sold on Indian Reservations.

The Court therefore agrees with the Idaho Supreme Court's decision in *Goodman Oil,* 28 P.2d at 1002, that the Hayden-Cartwright Act does not authorize states to tax motor fuel sales on Indian Reservations.

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[4] It would be odd indeed had Congress done that, because although it carved out an exception for fuels "for the exclusive use of the United States," it did not make the same exception for fuels that are for the exclusive use of Indian tribes.

B. Incidence of the Tax

Because there is no congressional authorization of the tax at issue here, the question is whether the incidence of the tax falls on the Indians. *Oklahoma Tax Comm'n,* 515 U.S. at 458, 115 S. Ct. at 2220 ("The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax."). Determination of whom the legal incidence falls on is one of "fair interpretation of the taxing statute as written and applied." *Cal. Bd. of Equalization v. Chemehuevi Tribe,* 474 U.S. 9, 11, 106 S. Ct. 289, 290 (1985) (per curiam). The question, is in part, on whom the law places the obligation to pay the tax. A party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector. *Oklahoma Tax Comm'n,* 515 U.S. at 461-62, 115 S. Ct. at 2222. Under such a "collect and remit" scheme, the state enlists one party in a commercial transaction to collect the tax from the other party. For instance, Plaintiffs here contend that the Idaho tax scheme is just such a "collect and remit" scheme, with the distributors merely collecting from the Indian retailers on whom the legal incidence falls.

At oral argument, counsel for Defendants stated that "everyone understands that the economic incidence of this tax will be borne by the consumer. That's just the way the market works." Indeed, the motor fuel tax is a relatively transparent tax. The amount of state and federal taxes is often posted for consumers to see on the pumps at filling stations. As Defense counsel here notes, it is generally accepted that motor fuel taxes are passed completely from the distributor to the retailer to the consumer without any serious market complications. The Supreme Court, however,

has held that the economic incidence of the tax cannot be the basis for determining who bears the legal incidence of a tax. *Oklahoma Tax Comm'n,* 515 U.S. at 460, 115 S. Ct. at 2222. Instead, the Court must examine the detail of the statute.

At the outset, the Court knows that the legal incidence of the Idaho motor fuel statute prior to the most recent amendments fell on the Indian retailers. *Goodman Oil,* 28 P.2d at 1002. Because the State Supreme Court is the final arbiter of state law, the determination by the Idaho Supreme Court is conclusive and binding as to the former statute. *See Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817 (1938). The only question is whether the amendments to the statute change the legal incidence.

In determining that the legal incidence of the old Idaho tax, the Idaho Supreme Court compared the Idaho statute to the Oklahoma statute at issue in *Oklahoma Tax Commission. Goodman Oil,* 28 P.2d at 1003. The Idaho Supreme Court found that the two statutes are "strikingly similar." *Id.* Both statutes allow the licensed distributor to deduct from future payments those taxes previously paid to the Commission that they are unable to collect from the retailer, but the retailers are neither allowed to set off their liability when consumers fail to make payments nor compensated for their tax collection efforts. *Id.* Finally, both statutes impose the tax once a distributor sells fuel to a reservation, and the tax applies whether or not the fuel is ever purchased by a consumer. *Id.*

The changes made to the Idaho motor fuels tax were minimal. The Legislature specifically amended the motor

fuels tax to express the intent of the legislature "to modify the holding of the Idaho Supreme Court in . . . *Goodman Oil* . . . to expressly impose the legal incidence of the motor fuels tax on the distributor who receives . . . the fuel in this state." 2002 Idaho Session Laws Chapter 174, § 1. According to the amended statute, the motor fuels tax is "imposed upon receipt of motor fuel in this state by any distributor receiving motor fuel upon which the tax imposed by this section has not been previously paid." Idaho Code § 63-2402. Importantly, Idaho's amended tax still provides the mechanism for the distributor to obtain a refund if the retailer does not pay the tax. Idaho Admin. Code § 35.01.05.180.02. Thus, even while declaring the distributor legally obligated to pay the tax, the legislature imposed no real burden on the distributor. Instead, the statute retains the "pass through" quality of the prior statute. No difference exists between the old statute and the new one. The amended statute must therefore still be a "collect and remit" scheme which places the incidence of the tax on the Indian retailers.

Defendants argue that the mere incantation by the legislature that the legal incidence falls on the distributor is conclusive. They cite the Supreme Court's statement in *Oklahoma Tax Commission* that the state could simply declare who the incidence falls on. 515 U.S. at 460, 115 S. Ct. at 2221. That statement, however, was merely dicta. Certainly, the Court could not expect the state to make no changes in the substance of the tax and thereby allow it to avoid the constitutional prohibition of imposing taxes on Indians. Moreover, such a simplistic view would undo the nuanced application of the law that the Court undertook in *Oklahoma Tax Commission.*

The Court is also presented with a serious concern over the constitutionality of the amended statute the way Defendants seek to construe it. If the statute were to in fact place the incidence of the tax on the distributor, therefore making the taxable event the entry into the state, it might place an impermissible barrier on interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3. If the incidence of the motor fuel tax falls on the distributors, and the distributors may in fact be held legally liable by the Commission for payment of the tax, then interstate distributors are faced with an extra burden in delivering the motor fuel into Idaho. This could burden interstate commerce. Moreover, if the taxable event is, as Defendants contend, the entry of the tax into the state, then the owner of the motor fuel would face a double tax if it decided that instead of selling it to Idaho consumers, it would re-sell the motor fuel to distributors in a neighboring state. The owner's price to the out-of-state retailer would increase 25 cents per gallon above the market price. This restriction in the ability to re-sell to other retailers in other states makes motor fuel less fungible in interstate commerce and may be an undue burden. Because the Court is required to construe statutes to avoid a constitutional question, this provides an alternative ground to determine that the incidence falls on the retailer, not the distributor.

IV.

CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss and for summary judgment are DENIED. Plaintiffs' motions for summary judgment and for a permanent injunction are GRANTED. Plaintiffs shall prepare and lodge a judgment within five (5) days of this order.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants and each of them are permanently enjoined from enforcing the Idaho Motor Fuel Tax Act, I.C. § 36-2401, *et seq.* as enacted on March 23, 2002, with respect to motor fuel delivered to, received by, or sold by Tribal or Indian owned retail gasoline stations on the Coeur D'Alene, Nez Pearce, or Shoshone Bannock Reservations; and

IT IS FURTHER ORDERED that the funds deposited in escrow pursuant to the Temporary Restraining Order issued in this case on April 29, 2002, and extended from time to time thereafter, shall be released to Plaintiffs after time to appeal from this order has expired under the Federal Rules of Appellate Procedure; and

IT IS FURTHER ORDERED that this order and the judgment of the Court may be stayed pending appeal without the posting of a bond upon the filing by Defendants of a notice of appeal within the time allowed for under the Federal Rules of Appellate Procedure; and

IT IS FURTHER ORDERED that during the pendency of any appeal, Plaintiffs shall continue to have deposited in an escrow account all tribal fuel tax revenues received by Plaintiffs in the same manner as set forth in the Temporary Restraining Order issued in this case on April 29, 2002; and

IT IS FURTHER ORDERED that this Injunction is binding upon the Defendants, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

IT IS SO ORDERED.

DATED: AUGUST 16, 2002

/s/ DAVID O. CARTER
DAVID O. CARTER
United States District Judge

SECTION 10 OF THE HAYDEN-CARTWRIGHT ACT AS AMENDED AND CODIFIED IN 4 U.S.C. § 104

§ 104. Tax on motor fuel sold on military or other reservation reports to State taxing authority

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.

IDAHO MOTOR FUEL TAX: EXCERPTS
IDAHO CODE
TITLE 63
CHAPTER 24

63-2401. Definitions.

In this chapter:

(1) "Aircraft engine fuel" means:

(a) Aviation gasoline, defined as any mixture of volatile hydrocarbons used in aircraft reciprocating engines; and

(b) Jet fuel, defined as any mixture of volatile hydrocarbons used in aircraft turbojet and turboprop engines.

(2) "Biodiesel" means any fuel or mixture of fuels that is:

(a) Derived in whole or in part from agricultural products or animal fats or the wastes of such products; and

(b) Suitable for use as fuel in diesel engines.

(3) "Bond" means:

(a) A surety bond, in an amount required by this chapter, duly executed by a surety company licensed and authorized to do business in this state conditioned upon faithful performance of all requirements of this chapter, including the payment of all taxes, penalties and other obligations arising out of the provisions of this chapter; or

(b) A deposit with the commission by any person required to be licensed pursuant to this chapter under

terms and conditions as the commission may prescribe, of a like amount of lawful money of the United States or bonds or other obligations of the United States, the state of Idaho, or any county of the state; or

(c) An irrevocable letter of credit issued to the commission by a bank doing business in this state payable to the state upon failure of the person on whose behalf it is issued to remit any payment due under the provisions of this chapter.

(4) "Commercial motor boat" means any boat, equipped with a motor, which is wholly or partly used in a profit-making enterprise or in an enterprise conducted with the intent of making a profit.

(5) "Commission" means the state tax commission of the state of Idaho.

(6) "Distributor" means any person who receives motor fuel in this state, and includes a special fuels dealer. Any person who sells or receives gaseous fuels will not be considered a distributor unless the gaseous fuel is delivered into the fuel supply tank or tanks of a motor vehicle not then owned or controlled by him.

(7) "Dyed fuel" means diesel fuel that is dyed pursuant to requirements of the internal revenue service, or the environmental protection agency.

(8) "Exported" means delivered by truck or rail across the boundaries of this state by or for the seller or purchaser from a place of origin in this state.

(9) "Gasohol" means gasoline containing a mixture of no more than ten percent (10%) blend anhydrous ethanol.

(10) "Gasoline" means any mixture of volatile hydrocarbons suitable as a fuel for the propulsion of motor vehicles or motor boats. "Gasoline" also means aircraft engine fuels when used for the operation or propulsion of motor vehicles or motor boats and includes gasohol, but does not include special fuels.

(11) "Highways" means every place of whatever nature open to the use of the public as a matter of right for the purpose of vehicular travel which is maintained by the state of Idaho or an agency or taxing subdivision or unit thereof or the federal government or an agency or instrumentality thereof. Provided, however, if the cost of maintaining a roadway is primarily borne by a special fuels user who operates motor vehicles on that roadway pursuant to a written contract during any period of time that a special fuels tax liability accrues to the user, such a roadway shall not be considered a "highway" for any purpose related to calculating that user's special fuels' tax liability or refund.

(12) "Idling" means the period of time greater than twenty-five hundredths (.25) of an hour when a motor vehicle is stationary with the engine operating at less than one thousand two hundred (1,200) revolutions per minute (RPM), without the power take-off (PTO) unit engaged, with the transmission in the neutral or park position, and with the parking brake set.

(13) "Imported" means delivered by truck or rail across the boundaries of this state by or for the seller or purchaser from a place of origin outside this state.

(14) "International fuel tax agreement" and "IFTA" mean the international fuel tax agreement required by the intermodal surface transportation efficiency act of 1991,

Public Law 102-240, 105 Stat. 1914, and referred to in title 49, U.S.C., section 31701, including subsequent amendments to that agreement.

(15) "Jurisdiction" means a state of the United States, the District of Columbia, a province or territory of Canada, or a state, territory or agency of Mexico in the event that the state, territory or agency participates in the international fuel tax agreement.

(16) "Licensed distributor" means any distributor who has obtained a license under the provisions of section 63-2427A, Idaho Code.

(17) "Motor fuel" means gasoline, special fuels, aircraft engine fuels or any other fuels suitable for the operation or propulsion of motor vehicles, motor boats or aircraft.

(18) "Motor vehicle" means every self-propelled vehicle designed for operation, or required to be licensed for operation, upon a highway.

(19) "Person" means any individual, firm, fiduciary, copartnership, association, limited liability company, corporation, governmental instrumentality including the state and all of its agencies and political subdivisions, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intent to give a more limited meaning is disclosed by the context. Whenever used in any clause prescribing and imposing a fine or imprisonment, or both, the term "person" as applied to an association means the partners or members, and as applied to corporations, the officers.

(20) "Recreational vehicle" means a snowmobile as defined in section 67-7101, Idaho Code; a motor driven

cycle or motorcycle as defined in section 49-114, Idaho Code; any recreational vehicle as defined in section 49-119, Idaho Code; and an all-terrain vehicle as defined in section 67-7101, Idaho Code.

(21) "Retail dealer" means any person engaged in the retail sale of motor fuels to the public or for use in the state.

(22) "Special fuels" means:

(a) All fuel suitable as fuel for diesel engines;

(b) A compressed or liquified gas obtained as a byproduct in petroleum refining or natural gasoline manufacture, such as butane, isobutane, propane, propylene, butylenes, and their mixtures; and

(c) Natural gas, either liquid or gas, and hydrogen, used for the generation of power for the operation or propulsion of motor vehicles.

(23) "Special fuels dealer" means "distributor" under subsection (6) of this section.

(24) "Special fuels user" means any person who uses or consumes special fuels for the operation or propulsion of motor vehicles owned or controlled by him upon the highways of this state.

(25) "Use" means either:

(a) The receipt, delivery or placing of fuels by a licensed distributor or a special fuels dealer into the fuel supply tank or tanks of any motor vehicle not owned or controlled by him while the vehicle is within this state; or

(b) The consumption of fuels in the operation or propulsion of a motor vehicle on the highways of this state.

[I.C., § 63-2401, as added by 1983, ch. 158, § 4, p. 436; am. 1984, ch. 87, § 1, p. 169; am. 1985, ch. 40, § 1, p. 81; am. 1985, ch. 242, § 1, p. 570; am. 1986, ch. 315, § 1, p. 777; am. 1987, ch. 82, § 1, p. 155; am. 1988, ch. 265, § 578, p. 549; am. 1991, ch. 306, § 1, p. 802; am. 1991, ch. 307, § 1, p. 805; am. 1992, ch. 106, § 1, p. 327; am. 1994, ch. 344, § 1, p. 1080; am. 1995, ch. 132, § 1, p. 565; am. 1995, ch. 348, § 1, p. 1142; am. 1996, ch. 223, § 1, p. 731; am. 1997, ch. 86, § 1, p. 205; am. 2001, ch. 104, § 1, p. 343; am. 2002, ch. 30, § 1, p. 37; am. 2002, ch. 174, § 3, p. 508; am. 2002, ch. 345, § 35, p. 963; am. 2004, ch. 235, § 1, p. 693; am. 2004, ch. 265, § 1, p. 745.]

63-2402. Imposition of tax upon motor fuel.

(1) A tax is hereby imposed upon the receipt of motor fuel in this state by any distributor receiving motor fuel upon which the tax imposed by this section has not previously been paid. The tax shall be imposed without regard to whether use is on a governmental basis or otherwise, unless exempted by this chapter.

(2) The tax imposed in this section shall be at the rate of twenty-five cents (25) per gallon of motor fuel received. This tax shall be subject to the exemptions, deductions and refunds set forth in this chapter. The tax shall be paid by distributors upon the distributor's receipt of the motor fuel in this state.

(3) Any person coming into this state in a motor vehicle may transport in the manufacturer's original tank of that vehicle, for his own use only, not more than thirty

(30) gallons of motor fuel for the purpose of operating that motor vehicle, without complying with the provisions of this chapter.

(4) The tax imposed in subsection (1) of this section does not apply to:

(a) Special fuels that have been dyed at a refinery or terminal under the provisions of 26 U.S.C. section 4082 and regulations adopted thereunder, or under the clean air act and regulations adopted thereunder except as provided in section 63-2425, Idaho Code; or

(b) Special fuel dispensed into a motor vehicle which uses gaseous special fuels and which displays a valid gaseous special fuels permit under section 63-2424, Idaho Code; or

(c) Special fuels that are gaseous special fuels, as defined in section 63-2401, Idaho Code, except that part thereof that is delivered into the fuel supply tank or tanks of a motor vehicle; or

(d) Aircraft engine fuel subject to tax under section 63-2408, Idaho Code.

[I.C., § 63-2402, as added by 1983, ch. 158, § 4, p. 436; am. 2002, ch. 174, § 2, p. 508.]

63-2403. Receipt of motor fuel – Determination.

Motor fuel is received as follows:

(1)(a) Motor fuel produced, refined, manufactured, blended or compounded by any person or stored at a pipeline terminal in this state by any person is received by that person when it is loaded into tank cars, tank trucks,

tank wagons or other types of transportation equipment or when it is placed into any tank or other container from which sales or deliveries not involving transportation are made.

(b) Motor fuel is received by a person other than the person designated in subsection (1)(a) of this section in the following circumstances:

(i) Motor fuel delivered from a pipeline terminal in this state to a licensed distributor is received by the licensed distributor to whom it is first delivered.

(ii) Motor fuel delivered to a person who is not a licensed distributor for the account of a person that is so licensed, is received by the licensed distributor for whose account it is shipped.

(2) Notwithstanding the provisions of subsection (1) above, motor fuel shipped or delivered from a refinery or pipeline terminal to another refinery or pipeline terminal, is not received by reason of that shipment or delivery.

(3) Any product other than motor fuel that is blended to produce motor fuel other than at a refinery or pipeline terminal in this state is received by the person who is the owner of the blended fuel after the blending is completed.

(4)(a) Motor fuel imported into this state, other than fuel placed in storage at a refinery or pipeline terminal in this state, is received at the time the fuel arrives in this state by the person who is, at the time of arrival, the owner of the fuel.

(b) Motor fuel imported into this state by a licensed distributor and delivered directly to a person not

a licensed distributor is received by the licensed distributor importing that fuel into this state at the time the fuel arrives in this state.

(c) Fuel arrives in this state at the time it crosses the border of this state.

[I.C, § 63-2403, as added by 1983, ch. 158, § 4, p. 436; am. 1997, ch. 85, § 1, p. 203; am. 2002, ch. 174, § 4, p. 508.]

63-2404. Method of measurement of gallons received.

Gasoline and/or aircraft engine fuel received by distributors shall be reported under rules and regulations prescribed by the commission, and be based upon consistent methods, generally recognized and accepted for gasoline and/or aircraft engine fuel tax accounting purposes, in respect to gallonage, stock transfers and stock accounting records.

[I.C., § 63-2404, as added by 1983, ch. 158, § 4, p. 436; am. 1983, ch. 242, § 2, p. 650.]

63-2405. Payment of tax.

The excise tax imposed by section 63-2402, Idaho Code, is to be paid by the distributor, and measured by the total number of gallons of motor fuel received by him, at the rate specified in section 63-2402, Idaho Code. That tax, together with any penalty and/or interest due, shall be remitted with the monthly distributor's report required in section 63-2406, Idaho Code.

[I.C., § 63-2405, as added by 1983, ch. 158, § 4, p. 436; am. 1983, ch. 242, § 2, p. 650; am. 1983 (Ex. Sess.), ch. 1, § 5, p. 3; am. 1984, ch. 87, § 2, p. 169; am. 1984, ch. 195,

§ 34, p. 445; am. 1986, ch. 344, § 2, p. 851; am. 1988, ch. 198, § 1, p. 376; am. 1991, ch. 120, § 1, p. 259; am. 1994, ch. 166, § 1, p. 373; am. 1996, ch. 343, § 4, p. 1149; am. 1998, ch. 103, § 2, p. 353; am. 2002, ch. 30, § 2, p. 37; am. 2002, ch. 174, § 5, p. 508.]

63-2406. Distributor reports.

(1) Each distributor shall, not later than the last day of each calendar month or for such other reporting period as the commission may authorize, render to the commission an accurate report of all motor fuel received by him in this state during the preceding reporting period. The report shall be made in the manner and on forms required by the commission.

(2) The distributor's report shall include:

(a) An itemized statement of the total number of gallons of motor fuel received during the preceding calendar month; and

(b) Other information as the commission may require for the proper administration of this chapter.

(3) The report shall be accompanied by a remittance of the tax shown to be due on the report together with any applicable interest and penalty, unless the amounts due are paid by electronic funds transfer in the manner provided by section 67-2026, Idaho Code.

(4) Any distributor required to pay the tax imposed by this chapter who fails to pay such tax shall be liable to the commission for the amount of tax not remitted plus any applicable penalty or interest. The commission may

collect such amounts in the manner provided in section 63-2434, Idaho Code.

[I.C., § 63-2406, as added by 1983, ch. 158, § 4, p. 436; am. 1998, ch. 103, § 3, p. 353; am. 2000, ch. 155, § 1, p. 392.]

63-2406A. Incentive for electronic filing of distributor's reports and payment of taxes.

(1) A qualified licensed distributor who, on or before December 31, 2003, receives approval from the commission to file electronically the reports required by section 63-2406, Idaho Code, and who pays taxes due under this chapter by electronic funds transfer, whether or not required to use electronic funds transfer, shall be entitled to a one-time, nonrefundable credit in the amount of two thousand five hundred dollars ($2,500).

(2) A "qualified licensed distributor" is a licensed distributor who, over the six (6) months immediately preceding the month in which the distributor may claim the credit provided in this section averaged in excess of fifty thousand (50,000) gallons each month of:

(a) Motor fuel received, plus

(b) Motor fuel shipped or delivered within a refinery or pipeline terminal or from a refinery or pipeline terminal to another refinery or pipeline terminal.

(3) The credit may be claimed on the first motor fuel distributor's report filed entirely by an electronic filing media approved by the commission if all associated amounts due are remitted by electronic funds transfer. In the case of a motor fuel distributor who, prior to the

effective date of this act, began filing its motor fuel distributor's reports entirely by an electronic filing media approved by the commission and paid all associated amounts due remitted by electronic funds transfer, the credit may be claimed on the first motor fuel distributor's report filed after the effective date of this act. Unused credit may be carried over to succeeding returns until fully applied against taxes due.

(4) If a distributor who has received all or part of the credit permitted by this section fails to file its distributor's report electronically or fails to remit any amount due by electronic funds transfer for three (3) or more months in any twelve (12) month period without due cause, the commission shall recapture the previously allowed credit. The commission may, within the time permitted for adjustment of the return on which the credit was claimed, collect the recaptured credit in the same manner as a deficiency in tax.

[I.C., § 63-2406A, as added by 2000, ch. 302, § 2, p. 1033.]

63-2407. Deductions authorized.

Each licensed distributor shall deduct from his monthly report:

(1) Motor fuel exported from this state other than in the supply tanks of motor vehicles, motor boats or aircraft when supported by a shipping document, an invoice signed by the purchaser, or other proper documents approved by the commission but only if:

(a) The purchaser is not a licensed distributor and the seller can establish that any tax due in the jurisdiction to which the motor fuel is destined is paid; or

(b) The purchaser is a licensed distributor in the jurisdiction to which the motor fuel is destined.

(2) Motor fuel returned to a licensed distributor's refinery or pipeline terminal storage when supported by proper documents approved by the commission.

(3) Motor fuel lost or destroyed by fire, lightning, flood, tornado, windstorm, explosion, or other accidental casualty, after presenting to the commission satisfactory proof of loss.

(4) The number of gallons which would be equal to one percent (1%) of the total number of gallons received during the reporting period, less the total number of gallons deducted under subsections (1) through (3) of this section, which credit is granted to the licensed distributor to reimburse him for the expense incurred on behalf of the state of Idaho in collecting and remitting motor fuel tax moneys, maintaining necessary records for the state, preparing necessary reports and remittances in compliance with this chapter, and for loss from evaporation, handling, spillage and shrinkage, except losses caused by casualty as provided in subsection (3) of this section. The licensed distributor may, in addition to the above, deduct the number of gallons equal to one percent (1%) of the total number of gallons received during the preceding calendar month, less the total number of gallons deducted under subsections (1) through (3) of this section, to cover shrinkage, evaporation, spillage and handling losses of a retail dealer. The latter deductions are to be allowed only upon filing with the commission satisfactory evidence as

may be prescribed by it indicating the credit allowance has been made in favor of the retail dealer or paid to him. The evidence shall be submitted together with the report wherein this portion of the deduction is claimed. A licensed distributor who sells and delivers motor fuel directly to the consumer and not for resale shall, with respect to those sales, be deemed a retail dealer for the purposes of this section.

(5) Motor fuel sold to the Idaho national guard for use in aircraft and in vehicles used off public highways provided, however, such deduction is supported by an exemption certificate signed by an authorized officer of the Idaho national guard.

(6) For sales made on or after July 1, 1995, taxes previously paid on gallons represented by accounts found to be worthless and actually charged-off for income tax purposes may be credited upon a subsequent payment of the tax provided in this chapter or, if no such tax is due, refunded. If such accounts are thereafter collected, the tax per gallon shall be paid based upon the amount actually received divided by the price per gallon of the original sale multiplied by the appropriate tax rate.

(7) In the case of motor fuel received during the reporting period and included in the report that is:

(a) Gasohol, deduct the number of gallons of denatured anhydrous ethanol contained in the gasohol.

(b) Biodiesel, in whole or in part, deduct the number of gallons of agricultural products or animal fats or the wastes of such products contained in the fuel.

The deduction provided in this subsection shall not exceed ten percent (10%) of (i) the volume of gasohol

reported on the report or (ii) the special fuel which is or contains biodiesel.

[I.C., § 63-2407, as added by 1983, ch. 158, § 4, p. 436; am. 1987, ch. 209, § 1, p. 442; am. 1989, ch. 406, § 1, p. 993; am. 1995, ch. 132, § 2, p. 565; am. 1995, ch. 303, § 1, p. 1051; am. 1996, ch. 223, § 2, p. 731; am. 1998, ch. 103, § 4, p. 353; am. 2002, ch. 30, § 3, p. 37.]

63-2410. Refund of gasoline tax procedure.

(1) Any person who shall purchase fifty (50) gallons or more, and use the gasoline in motor vehicles operated on highways outside of the state of Idaho where a duplicate tax is assessed for the same gasoline, shall be entitled to refund when a claim is presented to the commission in the manner required in subsection (5)(c) of this section. Claimant shall present to the commission a statement accompanied by a verification of the use determined by an audit of his operations conducted as prescribed by the tax commission; or his claim may be verified by the filing of a receipt or proof showing the payment of tax on the gasoline used in any other state.

(2) Any person who shall purchase within any one (1) calendar year fifty (50) gallons or more of gasoline used for the purposes described in this subsection shall be entitled to be refunded the amount of gasoline tax previously paid on that gasoline. Exempt uses are:

(a) Operating stationary gasoline engines;

(b) Propelling equipment or vehicles which are not licensed to be operated on a highway;

(c) Operating commercial motor boats; and

(d) Propelling an all-terrain vehicle that is not required to be registered pursuant to chapter 4, title 49, Idaho Code, or chapter 71, title 67, Idaho Code.

(3) No refund of gasoline tax shall be allowed for any gasoline which is:

(a) Used in motor vehicles required to be licensed or used in any motor vehicle exempt from registration by reason of the ownership or residence; or

(b) Aircraft engine fuel placed in aircraft, provided however, if tax has been paid at the rate provided in section 63-2405, Idaho Code, on any motor fuel placed in the fuel supply tank of an aircraft the user of the fuel may apply for a refund of the difference between the tax paid on the fuel and the tax imposed in section 63-2408, Idaho Code; or

(c) Used in recreational vehicles except all-terrain vehicles exempted as provided in subsection (2)(d) of this section; or

(d) Used in noncommercial motor boats or in boats operated by a governmental entity.

(4) Any licensed distributor paying the gasoline tax and/or aircraft engine fuel tax to the state of Idaho erroneously shall be allowed a credit or refund of the amount of tax paid by him if a written claim for refund is filed with the commission within three (3) years after the date those taxes were paid. Such credit or refund shall include interest at the rate established in section 63-3045, Idaho Code, computed from the date taxes to be refunded or credited were paid to the commission.

(5)(a) All claims for refund of gasoline taxes arising under subsection (1), (2) or (3)(b) of this section shall be filed in conjunction with the claimant's income tax return due pursuant to chapter 30, title 63, Idaho Code. The gasoline tax refund claimed shall be tax paid on gasoline actually purchased during the taxable year to which the income tax return relates. The gasoline tax refund due shall be offset against any other taxes, penalties or interest due before any balance is refunded by the commission to the claimant. Subject to a limitation as to the amount of refund to be claimed as the commission may provide by rule, refund claims may be submitted and paid on a monthly basis and reconciled on the income tax return when it is filed.

(b) If a claimant is not required to file an income tax return, the refund claim shall be made on forms and in the manner as the commission may provide. The claim shall relate to taxes paid on gasoline actually purchased in the calendar year preceding the filing and the claim shall be due on or before April 15 following the close of the calendar year.

(c) Claims for refunds under subsection (1) or (2) of this section shall be filed in the manner prescribed in section 63-3072, Idaho Code. Such credit or refund shall include interest at the rate established in section 63-3045, Idaho Code, computed from sixty (60) days following the later of the due date of the claimed refund under subsection (5)(a) or (5)(b) of this section or the filing of the claim. No refund shall be paid under this section unless a written claim for such refund has been filed with the commission within three (3) years after the due date, including extensions, of the income tax return in regard to which the

claim relates or the due date of the claim established in paragraph (b) of this subsection (5).

(d) The commission may require that all claims be accompanied by the original signed invoice or invoices issued to the claimant, showing the total amount of gasoline on which a refund is claimed and the reason, the amount of the tax and any additional information required by the commission. Each separate delivery shall constitute a purchase and a separate invoice shall be prepared, at least in duplicate, to cover the delivery. All invoices, except those prepared by a computer or similar machine, shall be prepared in ink or double-spaced carbon shall be used between the original and first duplicate.

(6)(a) Should the commission find that the claim contains errors, it may correct the claim and approve it as corrected, or the commission may require the claimant to file an amended claim. The commission may require any person who makes a claim for refund to furnish a statement under oath, giving his occupation, description of the machine or equipment in which the gasoline was used, the place where used and any other information as the commission may require. If the commission determines that any claim has been fraudulently presented, or is supported by an invoice or invoices fraudulently made or altered, or that any statement in the claim or affidavit is willfully false and made for the purpose of misleading, the commission may reject the claim in full. If the claim is rejected, the commission may suspend the claimant's right to any refund for purchases made during a period not to exceed one (1) year beginning with the date the rejected claim was filed, and it shall take all other action deemed appropriate.

(b) The commission has authority, in order to establish the validity of any claim, to examine the books and records of the claimant for that purpose, and failure of the claimant to accede to the demand for the examination may constitute a waiver of all rights to the refund claimed.

(7) In the event of the loss or destruction of the original invoice or invoices, the person claiming a refund may submit a duplicate copy of the invoice certified by the vendor, but payment based on the duplicate invoice shall not be made until one (1) year after the date on which the gasoline was purchased.

[I.C., § 63-2410, as added by 1983, ch. 158, § 4, p. 436; am. 1986, ch. 175, § 1, p. 84; am. 1993, ch. 47, § 4, p. 119; am. 1995, ch. 132, § 5, p. 565; am. 1995, ch. 348, § 2, p. 1142; am. 1998, ch. 196, § 1, p. 707; am. 2001, ch. 104, § 2, p. 343; am. 2002, ch. 30, § 4, p. 37; am. 2004, ch. 235, § 2, p. 693.]

63-2411. Purchase of gasoline by retail dealers.

It shall be unlawful for any retail dealer in gasoline or aircraft engine fuel or for any person in the state of Idaho other than a licensed distributor to purchase, receive or accept any gasoline from any other person, unless that person is a licensed distributor. Any person in violation of these provisions shall be guilty of a misdemeanor.

[I.C., § 63-2411, as added by 1983, ch. 158, § 4, p. 436.]

63-2412. Distribution of tax revenues from tax on gasoline and aircraft engine fuel.

(1) The revenues received from the taxes imposed by sections 63-2402 and 63-2421, Idaho Code, upon the receipt or use of gasoline, and any penalties, interest, or deficiency additions, shall be distributed periodically as follows:

(a) An amount of money equal to the actual cost of collecting, administering and enforcing the gasoline tax requirements by the commission, as determined by it shall be retained by the commission. The amount retained by the commission shall not exceed the amount authorized to be expended by appropriation by the legislature. Any unencumbered balance in excess of the actual cost of collecting, administering and enforcing the gasoline tax requirements by the commission at the end of each fiscal year shall be distributed as listed in paragraph (e) of this subsection.

(b) An amount of money shall be distributed to the state refund account sufficient to pay current refund claims. All refunds authorized by the commission to be paid shall be paid from the state refund account and those moneys are hereby continuously appropriated for that purpose.

(c) As soon as possible after the beginning of each fiscal year, the sum of two hundred fifty thousand dollars ($250,000) shall be distributed to the railroad grade crossing protection account in the dedicated fund, to pay the amounts from the account pursuant to the provisions of section 62-304C, Idaho Code.

(d) As soon as possible after the beginning of each fiscal year, the sum of one hundred thousand dollars ($100,000) shall be distributed to the local bridge inspection account in the dedicated fund, to pay the amounts from the account pursuant to the provisions of section 40-703, Idaho Code.

(e) From the balance remaining with the commission after distributing the amounts in paragraphs (a) through (d) of subsection (1) of this section:

1. One and twenty-eight hundredths percent (1.28%) shall be distributed as follows: sixty-six percent (66%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed to the waterways improvement account, as created in chapter 15, title 57, Idaho Code. Up to twenty percent (20%) of the moneys distributed to the waterways improvement account under the provisions of this paragraph may be used by the department of parks and recreation to defray administrative costs. Any moneys unused at the end of the fiscal year by the department of parks and recreation shall be returned to the state treasurer for deposit in the waterways improvement account. Thirty-three percent (33%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed into the park and recreation capital improvement account as created in section 57-1801, Idaho Code. One percent (1%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed to the search and rescue fund created in section 67-2913, Idaho Code;

2. One and twenty-eight hundredths percent (1.28%) shall be distributed as follows: sixty-six percent (66%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed to the off-road motor vehicle account, as

created in section 57-1901, Idaho Code. Up to twenty percent (20%) of the moneys distributed to the off-road motor vehicle account by this subparagraph may be used by the department of parks and recreation to defray administrative costs. Any moneys unused at the end of the fiscal year by the department of parks and recreation shall be returned to the state treasurer for deposit in the off-road motor vehicle account. Thirty-three percent (33%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed into the park and recreation capital improvement account as created in section 57-1801, Idaho Code. One percent (1%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed to the search and rescue fund created in section 67-2913, Idaho Code; and

3. Forty-four hundredths percent (.44%) shall be distributed to the park and recreation capital improvement account as created in section 57-1801, Idaho Code, to be used solely to develop, construct, maintain and repair roads, bridges and parking areas within and leading to parks and recreation areas of the state.

4. The balance remaining shall be distributed to the highway distribution account created in section 40-701, Idaho Code.

(2) The revenues received from the taxes imposed by section 63-2408, Idaho Code, and any penalties, interest, and deficiency amounts, shall be distributed as follows:

(a) An amount of money shall be distributed to the state refund account sufficient to pay current refund claims. All refunds authorized by the commission to be paid shall be paid from the state refund account, and those moneys are hereby continuously appropriated.

(b) The balance remaining of all the taxes collected shall be distributed to the state aeronautics account, as provided in section 21-211, Idaho Code.

[I.C., § 63-2412, as added by 1983, ch. 158, § 4, p. 436; am. 1984, ch. 87, § 4, p. 169; am. 1984, ch. 195, § 35, p. 445; am. 1985, ch. 33, § 1, p. 66; am. 1985, ch. 253, § 9, p. 586; am. 1986, ch. 73, § 8, p. 277; am. 1986, ch. 99, § 3, p. 277; am. 1988, ch. 253, § 1, p. 487; am. 1990, ch. 395, § 1, p. 1106; am. 1991, ch. 120, § 2, p. 259; am. 1993, ch. 301, § 1, p. 1116; am. 1994, ch. 280, § 6, p. 867; am. 1994, ch. 315, § 3, p. 1001; am. 1997, ch. 50, § 1, p. 84; am. 2000, ch. 100, § 1, p. 220; am. 2000, ch. 186, § 3, p. 456; am. 2002, ch. 174, § 6, p. 508.]

63-2418. Distribution of tax revenues from tax on special fuels.

The revenues received from the tax imposed by this chapter upon the receipt of special fuel and any penalties, interest, or deficiency additions, or from the fees imposed by the commission under the provisions of section 63-2424 or 63-2438, Idaho Code, shall be distributed as follows:

(1) An amount of money equal to the actual cost of collecting, administering and enforcing the special fuels tax provisions by the commission, as determined by it shall be retained by the commission. The amount retained by the commission shall not exceed the amount authorized to be expended by appropriation by the legislature. Any unencumbered balance in excess of the actual cost of collecting, administering and enforcing the special fuels tax requirements by the commission at the end of each

fiscal year shall be distributed to the highway distribution account.

(2) An amount of money shall be distributed to the state refund account sufficient to pay current refund claims. All refunds authorized by the commission to be paid under this chapter shall be paid from the state refund account, those moneys being hereby continuously appropriated.

(3) The balance remaining with the commission after distributing the amounts specified in subsections (1) and (2) of this section shall be distributed to the highway distribution account, established in section 40-701, Idaho Code.

[I.C., § 63-2418, as added by 1983, ch. 158, § 4, p. 436; am. 1984, ch. 87, § 7, p. 169; am. 1984, ch. 195, § 36, p. 445; am. 1985, ch. 33, § 2, p. 66; am. 1985, ch. 253, § 10, p. 586; am. 1986, ch. 73, § 9, p. 201; am. 2000, ch. 155, § 3, p. 392; am. 2002, ch. 174, § 8, p. 508.]

63-2421. Use tax – Returns and payment of use tax by consumers.

(1) For the privilege of using the highways of this state, any person who consumes motor fuels in a motor vehicle licensed or required to be licensed by the laws of this state, or which is required to be licensed under the laws of this state and is operated on the highways of this state upon which the tax imposed by section 63-2402, Idaho Code, has not been paid or is subject to credit or refund under IFTA and which fuel is not exempted from tax by this chapter, shall be liable for the tax.

(2) Except for motor vehicles licensed under IFTA or operating with a temporary permit under section 49-432, Idaho Code, persons liable under subsection (1) of this section shall report the amount of tax liability and pay the taxes due in conjunction with his income or franchise tax return due under the provisions of chapter 30, title 63, Idaho Code, in the manner and form prescribed by the commission. Payment of motor fuels taxes shall be made in conjunction with any other taxes due on that return and motor fuels taxes due may be offset against refunds of any other taxes shown on the return to be due the taxpayer.

(3) In the case of a person liable under subsection (1) of this section other than one who consumes motor fuels in a motor vehicle described in the exception in subsection (2) of this section and not required to file a return under chapter 30, title 63, Idaho Code, the tax shall be paid annually, on a calendar year basis, in the manner and form required by the commission. The return and payment for each calendar year shall be due on or before April 15 of the immediately succeeding calendar year.

(4) In the case of a person liable under subsection (1) of this section whose motor vehicles are licensed or required to be licensed under IFTA as provided in sections 63-2438 and 63-2439, Idaho Code, or operating with a temporary permit under section 49-432, Idaho Code, the tax shall be paid in the manner required by those provisions.

[I.C., § 63-2421, as added by 1983, ch. 158, § 4, p. 436; am. 1992, ch. 106, § 5, p. 327; am. 1995, ch. 132, § 7, p. 565; am. 1997, ch. 86, § 2, p. 205; am. 2002, ch. 30, § 5, p. 37; am. 2002, ch. 174, § 9, p. 508.]

63-2423. Credits and refunds to consumers.

(1) Any person who has paid his special fuels tax directly to the vendor from whom it was purchased shall be refunded the amount of:

(a) Except as provided in subsection (2) of this section, any special fuels tax paid on special fuels used for purposes other than operation or propulsion of motor vehicles upon the highways in the state of Idaho;

(b) Any tax paid on special fuels used in motor vehicles owned or leased and operated by an instrumentality of the federal government or of the state of Idaho, including the state and all of its political subdivisions;

(c) Any tax paid on special fuels used in motor vehicles to which gaseous special fuel is delivered and which displays a valid gaseous special fuels permit under section 63-2424, Idaho Code;

(d) Any special fuels tax paid on special fuels exported for use outside the state of Idaho. Special fuels carried from the state in the fuel tank of a motor vehicle will not be deemed to be exported from the state unless it is subject to a like or similar tax in the jurisdiction to which it is taken and that tax is actually paid to the other jurisdiction; and

(e) Any tax, penalty or interest erroneously or illegally paid or collected.

(2) No refund of special fuels tax shall be paid on:

(a) Special fuels used in a recreational vehicle; or

(b) Special fuels used in noncommercial motor boats or in motor boats operated by a governmental entity; or

(c) Special fuels used while idling a registered motor vehicle, pursuant to the definition of "idling" as provided in section 63-2401, Idaho Code.

(3) Refunds authorized in this section shall be claimed in the same manner as applies to refunds of gasoline tax under section 63-2410, Idaho Code, and shall be subject to interest computed pursuant to subsection (5) of that section.

[I.C., § 63-2423, as added by 1983, ch. 158, § 4, p. 436; am. 1995, ch. 348, § 4, p. 1142; am. 1997, ch. 375, § 1, p. 1205; am. 1998, ch. 103, § 6, p. 353; am. 1998, ch. 196, § 2, p. 707; am. 2004, ch. 265, § 2, p. 745.]

63-2427. Administration.

The commission shall enforce the provisions of this chapter and may prescribe, adopt, and enforce reasonable rules and regulations relating to the administration and enforcement of those provisions.

[I.C., § 63-2427, as added by 1983, ch. 158, § 4, p. 436.]

63-2427A. Distributor's license.

(1) It is unlawful for a person to act as a distributor without a license unless the person only purchases fuel which is either or both:

(a) Motor fuel on which any tax due under this chapter has previously been imposed upon a licensed distributor; or

(b) Dyed fuel upon which the transfer fee imposed in section 41-4909, Idaho Code, has been imposed upon a licensed distributor.

(2) Application for a license shall be made upon forms furnished and in a manner prescribed by the commission and shall contain information as it deems necessary, and be accompanied by a bond in the amount required in section 63-2428, Idaho Code.

(3) Upon receipt of the application and bond in proper form the commission shall issue the applicant a license to act as a distributor unless the applicant:

(a) Is a person who formerly held a license under the provisions of this chapter, any predecessor statute, under the laws of any other jurisdiction, or under the laws of the United States which license, prior to the time of filing this application, had been revoked for cause within five (5) years from the date of such application; or

(b) Is a person who has outstanding fuel tax liabilities to this state, any other jurisdiction or the United States government; or

(c) Is a person who has been convicted, under the laws of the United States or any state or jurisdiction or subdivision thereof, of fraud, tax evasion, or a violation of the laws governing the reporting and payment of fees or taxes for petroleum products within five (5) years from the date of making such application; or

(d) Is a person who has been convicted of a felony or been granted a withheld judgment following an adjudication of guilt of a felony within five (5) years from the date of such application; or

(e) Who is not the real party in interest and the real party in interest is a person described in subsection (3)(a), (3)(b), (3)(c) or (3)(d) of this section.

(4) Upon approval of the application the distributor's license shall be valid until it is suspended or revoked for cause, for failure to maintain the bond required in section 63-2428, Idaho Code, for failure to file returns required in this chapter, for failure to pay all taxes and fees due with a return required in this chapter, or is otherwise canceled.

(5) No distributor's license shall be transferable.

(6) The commission shall furnish each licensed distributor with a list of all distributors licensed pursuant to this section. The list shall be supplemented by the commission from time to time to reflect additions and deletions.

[I.C., § 63-2427A, as added by 1995, ch. 132, § 9, p. 565; am. 2003, ch. 96, § 52, p. 281.]

63-2429. Required records.

(1) Every distributor and every special fuels dealer and every person reporting, manufacturing, refining, dealing, transporting or storing gasoline, aircraft engine fuel or special fuels in this state shall keep records, receipts, invoices and other pertinent records as the commission may require. Records required and all other relevant books and records shall be available for inspection by the commission at all times during regular record keeper's business hours.

(2) Records required in subsection (1) of this section shall be kept for a period of three (3) years from the date

on which the distributor's report or special fuels dealer's return to which they relate was required to be filed with the commission.

[I.C., § 63-2429, as added by 1983, ch. 158, § 4, p. 436.]

63-2430. Revocation or cancellation of license.

(1) The commission may revoke the license of a distributor or a carrier licensed in Idaho under the international fuel tax agreement in any of the following circumstances:

(a) The licensee refuses or neglects to comply with the provisions of this chapter or rules of the commission promulgated pursuant to this chapter;

(b) When, upon investigation, the commission ascertains or finds that the person to whom the license was issued is no longer engaged in business as a distributor or an Idaho IFTA carrier and has not been so engaged for a period of six (6) months prior to the cancellation; or

(c) The licensee files a written request with the commission asking that the license be revoked and the commission determines upon investigation, that the licensee is no longer a person required to be a licensed distributor or required to have an IFTA license.

(2) In the case of a cancellation under paragraph (c) of subsection (1) of this section, the cancellation shall not be effective nor shall the licensee's surety be discharged from any bond unless the licensee has paid to the state of Idaho all taxes imposed under this chapter together with all penalties, interest and additional amounts which have accrued.

(3) In the case of revocation of a license under paragraph (a) or (b) of subsection (1) of this section, prior to revoking the license the commission shall give notice of the proposed revocation to the licensee in the manner provided in section 63-3045, Idaho Code, which shall be subject to review as provided in section 63-3045, Idaho Code. If a petition for redetermination of the license revocation is not filed within the time period allowed, the determination becomes final as provided in section 63-3045B, Idaho Code. The state tax commission shall not issue a new license after the revocation of a license unless the commission is satisfied that the former holder of the license has filed all returns and reported and paid all taxes, penalty and interest required by this chapter and corrected any other violations of this chapter upon which the revocation was based.

[I.C., § 63-2430, as added by 1983, ch. 158, § 4, p. 436; am. 1997, ch. 86, § 3, p. 205.]

63-2431. Tax in lieu of all other taxes imposed.

The taxes imposed by this chapter shall be in lieu of all other excise taxes, license fees or property taxes imposed upon gasoline, aircraft engine fuel or special fuels by this state or any political subdivision of this state.

[I.C., § 63-2431, as added by 1983, ch. 158, § 4, p. 436.]

63-2432. Civil action to prevent doing business without license – Injunction.

If the commission determines that any person is engaged in business as a distributor or special fuels dealer without holding a valid license, it may proceed by injunction

or other legal process to prevent the continuance of the business, and an injunction enjoining the continuance of the business by any unlicensed person may be granted without bond by any court or judge authorized by law to grant injunctions.

[I.C., § 63-2432, as added by 1983, ch. 158, § 4, p. 436.]

63-2433. Doing business without a license – Penalties.

Any person who engages in the business as a distributor or a special fuels dealer without being the holder of a valid license shall be guilty of a misdemeanor. Each day of business without a valid license shall constitute a separate offense.

[I.C., § 63-2433, as added by 1983, ch. 158, § 4, p. 436.]

63-2434. Enforcement provisions.

For the purpose of carrying out its duties to enforce or administer the provisions of this chapter, the commission shall have the powers and duties provided by sections 63-3038, 63-3039, 63-3042 through 63-3066, 63-3068, 63-3071, 63-3074 through 63-3078, and 63-217, Idaho Code, which sections are incorporated by reference herein as though set out verbatim.

[I.C., § 63-2434, as added by 1983, ch. 158, § 4, p. 436; am. 1994, ch. 344, § 6, p. 1080; am. 1996, ch. 322, § 62, p. 1029.]

63-2435. Taxes are state money.

When a distributor sells gasoline or aircraft engine fuel subject to tax under this chapter or a special fuels dealer sells special fuels subject to tax under this chapter, a portion of the receipts from those sales equal to the amount of tax required to be paid upon the fuels sold shall, immediately upon receipt by the distributor or special fuels dealer, be state money and shall be held in trust for the state of Idaho and for payment to the commission in the manner and at the times required by this chapter. This tax money shall not, for any purpose, be considered to be a part of the proceeds of the sale to which the tax relates and shall not be subject to encumbrance, security interest, execution of seizure on account of any debt owed by the distributor or the special fuels dealer to any creditor other than the commission.

[I.C., § 63-2435, as added by 1983, ch. 158, § 4, p. 436.]

63-2436. Reports of importations by carrier – Contents.

The commission may require any railroad or other common carrier, or contract carrier, or any person, other than a licensee, who makes delivery in this state of any gasoline, aircraft engine fuel or special fuels to report in writing to the commission, not later than the last day of each calendar month, all the deliveries for the preceding calendar month. The commission may require information in the reports to include the place of origin and place of destination of the gasoline, aircraft engine fuel or special fuels delivered, the names and addresses of consignors and consignees, loading ticket numbers, number of gallons

delivered, and any other information the commission may require.

[I.C., § 63-2436, as added by 1983, ch. 158, § 4, p. 436; am. 2001, ch. 104, § 3, p. 343.]

63-2443. Violations and penalties.

(a) Acts forbidden: It shall be unlawful for any person to:

(1) Refuse, or knowingly and intentionally fail to make and file any statement required by this chapter in the manner or within the time required;

(2) Wilfully fail to pay any tax due or any fee required by this chapter or any related penalties or interest;

(3) Knowingly and with intent to evade or to aid in the evasion of the tax imposed by this chapter to make any false statement or conceal any material fact in any record, return, or affidavit provided for in this chapter;

(4) Conduct any activities requiring a license under this chapter without a license or after a license has been surrendered, canceled, or revoked;

(5) Fail to keep and maintain the books and records required by this chapter;

(6) Use dyed or untaxed fuel in a manner prohibited in this chapter.

(b) It shall be unlawful for any retail dealer in motor fuel who is not a licensed distributor or for any person in the state of Idaho other than a licensed distributor to

purchase, receive or accept any motor fuel upon which tax imposed by this chapter has not been paid.

(c) It shall be unlawful for any person, including a licensed distributor, to sell or transfer any fuel upon which tax required by this chapter has not been paid to any person unless such sale or transfer is authorized by this chapter.

(d) Penalties and remedies: Any person violating any provision of this section is guilty of a misdemeanor, unless the act is by any other law of this state declared to be a felony, and upon conviction is punishable by a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000).

(e) Penalties are cumulative: The fine and imprisonment provided for in this section shall be in addition to any other penalty imposed by any other provision of this chapter.

[I.C., § 63-2443, as added by 1984, ch. 87, § 13, p. 169; am. 1995, ch. 348, § 6, p. 1142; am. 2002, ch. 174, § 12, p. 508.]

IDAHO MOTOR FUELS TAX ADMINISTRATIVE RULES: EXCERPTS

IDAHO ADMINISTRATIVE CODE 35 TITLE 01 CHAPTER 06

000. LEGAL AUTHORITY (Rule 000).

According to sections 63-513, 63-2427 and 41-4908, Idaho Code, the Tax Commission promulgates rules implementing the provisions of the Idaho Motor Fuels Tax Act and the provisions of the Idaho Clean Water Trust Fund Act relating to the Idaho Clean Water Trust Fund Transfer Fee. (6-23-94)

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010. DEFINITIONS (Rule 010).

The definitions provided by statute, including the definitions in Section 63-2401, Idaho Code, apply to these rules. Additionally, the following definitions shall apply. (6-23-94)

01. Bond. A person required to post a bond may, instead of posting a surety bond, deposit with the State Tax Commission any of the following amounts equivalent to the amount of the bond required: (3-30-01)

a. Lawful money. Lawful money of the United States. Cash bonds must be submitted as a cashier's check, money order or other certified funds that are payable to the Idaho State Tax Commission. A cash bond will not accrue interest. The State Tax Commission will cash the funds and hold the money for the duration the taxpayer holds a distributor license. (3-30-01)

b. Letters of credit. Irrevocable standby letters of credit, not exceeding the federally insured amount, issued

by a bank doing business in Idaho, and insured by the Federal Deposit Insurance Corporation, made to the benefit of the Idaho State Tax Commission. The terms of the letter of credit must allow the State Tax Commission to make demand directly against the issuer of the letter of credit for any taxes, penalties, and interest due and unpaid, upon which the taxpayer's rights to appeal have expired, and for which the letter of credit was submitted to secure. The letter must include the following items: (3-30-01)

i. Issuing institution; (3-30-01)

ii. Taxpayer's name; (3-30-01)

iii. Effective date; (3-30-01)

iv. Expiration date and place; (3-30-01)

v. Idaho State Tax Commission as the payee; (3-30-01)

vi. Dollar amount covered; (3-30-01)

vii. Terms of letter; (3-30-01)

viii. Letter number; and (3-30-01)

ix. Authorized signatures. (3-30-01)

c. Time Certificates of Deposit (CD). Automatically renewable time certificates of deposit, not exceeding the federally insured amount, issued by a financial institution doing business in Idaho and federally insured, made in the name of the depositor, payable to the "Idaho State Tax Commission" and containing the provisions that interest earned shall be payable to the depositor. The State Tax Commission will hold the CD. If the financial institution holds the actual CD or does not issue a certificate, a

verification form is required by the State Tax Commission confirming the CD. The form may be obtained from the State Tax Commission. (3-30-01)

d. Joint Savings Account. Joint savings accounts, not exceeding the federally insured amount, at a financial institution doing business in Idaho and federally insured. The joint savings account should be issued in the name of the taxpayer and the "Idaho State Tax Commission." Evidence of the insured account must be delivered to the State Tax Commission. The taxpayer will be notified by the State Tax Commission of any increases in bonding when it becomes necessary. The taxpayer may send a check to cover the difference which will be deposited in the joint savings account. The interest accrued on the account is the taxpayer's. The terms of the joint savings account agreement must include the following: (3-30-01)

i. No Automatic Teller Machine (ATM) card may be issued to the account; and (3-30-01)

ii. Withdrawals require both signatures of the parties of the joint account or by the Idaho State Tax Commission alone. (3-30-01)

02. Commercial Motor Boat. A commercial motor boat, as defined in Section 63-2401(4), Idaho Code, includes a motor boat used in a business that rents boats to others who use the boats for pleasure. (6-23-94)

03. IFTA. Means the International Fuel Tax Agreement referred to in the Intermodal Surface Transportation Act of 1991, Public Law 102-240 section 4008, 105 Stat. 1414, codified as 49 USC Sections 31701 through 31708, and in section 63-2442A, Idaho Code. (3-30-01)

04. Pay, Paid, Payable Or Payment. When used in reference to any amount of tax, penalty, interest, fee or other amount of money due to the State Tax Commission, the words pay, paid, payable, or payment mean an irrevocable tender to the Idaho State Tax Commission of lawful money of the United States. As used herein, lawful money of the United States means currency or coin of the United States at face value and negotiable checks that are payable in money of the United States; provided however, acceptance by the State Tax Commission of any check that is subsequently dishonored by the bank upon which it is drawn shall not constitute payment. Additionally, nothing herein shall limit the authority of the State Tax Commission to refuse to accept any check drawn upon the account of a taxpayer who has previously tendered any check that was dishonored by the bank upon which it was drawn. All amounts due the state must be paid by electronic funds transfer whenever the total amount of tax due plus any related fee, interest, penalty or other additional amount is one hundred thousand dollars ($100,000) or more, according to rules promulgated by the Idaho State Board of Examiners. (3-30-01)

05. These Rules. The term "these rules" refers to this chapter, IDAPA 35.01.05, of rules relating to the Idaho Motor Fuels Tax and the Idaho Petroleum Transfer Fee. (6-23-94)

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105. LICENSED GASEOUS FUELS DISTRIBUTOR'S REPORTS (Rule 105).

01. Monthly Reports. Every licensed gaseous fuels distributor shall file with the State Tax Commission a monthly tax report and supporting detailed schedules on

forms prescribed by the State Tax Commission. Such reports shall contain a declaration by the person filing the report that the statements contained therein are true and are made under penalties of perjury. The report shall include the following information together with such other information as the State Tax Commission may require: (7-1-99)

a. The total taxable gallons of gaseous fuels sold; (4-5-00)

b. The taxable gallons after deduction of a two percent (2%) allowance. See Rule 140 of these rules; (4-5-00)

c. The tax computation; (7-1-99)

d. The bad debt amount, if any. See Rule 140 of these rules; (4-5-00)

e. The gaseous fuels permit fees (Attach to the report the yellow copy of the receipt for each gaseous fuels permit sold during that month); and (4-5-00)

f. The net tax due; (4-5-00)

g. A receipt schedule reporting the total number of taxable gallons of gaseous fuels sold must be attached to the distributor's report. (4-5-00)

02. Report Due And Payment Required. The report shall be due on or before the last day of the month following the month to which the report relates together with the payment of any tax, annual gaseous fuels permit fees, penalty or interest due. See Rule 010 of these rules relating to method of payment and requirement for payments of one hundred thousand dollars ($100,000) or more. (7-1-99)

03. Failure To Collect And Remit Tax And Permit Fees. Any gaseous fuels distributor required to collect the tax or permit fee imposed by Section 63-2424, Idaho Code, who fails to collect such tax or permit fee, or any gaseous fuels distributor required to remit the tax or permit fee pursuant to this section who fails to make such remittance shall be liable to the State Tax Commission for the amount of tax or permit fee not collected or remitted plus any applicable penalty or interest. The State Tax Commission may collect such amounts in the manner provided in Section 63-2434, Idaho Code. (7-1-99)

04. Receipt Of Gaseous Fuels. The special fuels tax is not imposed on gaseous fuels when the fuels are received in Idaho. (4-5-00)

05. Gaseous Fuels. Propane and natural gas are presumed to be tax-exempt fuels unless delivered into the supply tank of a licensed, or required to be licensed, motor vehicle. (4-5-00)

06. Annual Fees For Gaseous Fuels Permits. Persons operating vehicles powered by gaseous fuels may pay an annual fee for a gaseous fuels permit instead of paying the special fuel taxes at the time propane or natural gas is purchased. Gaseous fuels distributors who sell these permits shall issue a permit that will be in the form of a decal to be displayed in a conspicuous spot visible from the outside of the permitted vehicle. The fees for gaseous fuels permits are based on the gross vehicle weight of the vehicles and are set by Rule 115 of these rules as is mandated by Section 63-2424(2), Idaho Code. The gaseous fuels permit is valid for the annual permit period of July 1 through June 30 of the following year. The

annual permit period displayed on the decal will be the year in which the decal expires. (4-5-00)

07. Documentation Of Untaxed Sales Of Gaseous Fuels Into Motor Vehicles. Gaseous fuels delivered into the fuel supply tank of a licensed, or required to be licensed, motor vehicle are taxable except for: (7-1-99)

a. Government. Gaseous fuels used by vehicles owned or leased, and operated by the federal government, or by an instrumentality of the state of Idaho, including all of its political subdivisions, are exempt from the special fuels tax on gaseous fuels. In this case, the licensed distributor must record on the document of sale, the name of the governmental entity, the license or identification number, and the type of vehicle. (7-1-99)

b. Gaseous Fuels Decal. Gaseous fuels dispensed into the fuel supply tank of a motor vehicle displaying a valid Gaseous Fuels Decal are exempt from tax. For the exempt status to be valid, the purchaser's name, address, vehicle license number, and the words "gaseous fuels decal" must be recorded on the sales document. (4-5-00)

08. Completion Of Gaseous Fuels Receipt Book(s). The following information is required to be recorded by a gaseous fuels distributor in his gaseous fuels receipt book for each gaseous fuels permit (decal) sold: (4-5-00)

a. The date; (4-5-00)

b. The amount; (4-5-00)

c. One (1) of the following weight classes: (4-5-00)

i. Zero – eight thousand pounds (0 – 8,000 lbs.); or (4-5-00)

ii. Eight thousand one – sixteen thousand pounds (8,001 – 16,000 lbs.); or (4-5-00)

iii. Sixteen thousand one – twenty-six thousand pounds (16,001 – 26,000 lbs.); or (4-5-00)

iv. Twenty-six thousand one pounds (26,001 lbs.) and over. (4-5-00)

d. The current month; (4-5-00)

e. The annual permit period; (4-5-00)

f. The customer's name and vehicle license plate number; (4-5-00)

g. The name and license number of the gaseous fuels distributor who is selling the permit; and (4-5-00)

h. The signature of the salesperson. (4-5-00)

09. Annual Reconciliation Of Gaseous Fuels Receipt Books And Decals. A distributor who sells gaseous fuels permits must reconcile its account with the State Tax Commission for the annual permit period ending June 30, by July 31, of the same year. Distributors may begin ordering decals and receipt books in May for the upcoming annual permit period. The following is required to be received by the State Tax Commission for reconciliation: (4-5-00)

a. All unused/unsold gaseous fuels decals; (4-5-00)

b. All voided receipts (white and yellow copies) not previously submitted with the distributor report; (4-5-00)

c. All receipt books (pink copies must be intact); and (4-5-00)

d. A completed gaseous fuels reconciliation form which includes: (4-5-00)

i. The number of decals ordered for the annual permit period; (4-5-00)

ii. The number of decals sold for the annual permit period; (4-5-00)

iii. The balance of decals at the end of the annual permit period; and (4-5-00)

iv. The number, if any, of decals lost or destroyed. If decals are lost or destroyed, a statement describing the circumstances of the loss or destruction must accompany the distributor's gaseous fuels permit reconciliation. (4-5-00)

10. Assessment For Unaccounted For Decals. Two hundred and eight dollars ($208) will be assessed for each decal not accounted for during the annual reconciliation, unless there is clear and convincing evidence the decal was destroyed or mutilated. (4-5-00)

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110. CALCULATION OF TAX ON GASEOUS FUELS (Rule 110).

01. In General. In all cases in which any tax under Chapter 24, Title 63, Idaho Code, must be calculated for any special fuel that is a gaseous fuel, the following equivalency formulas shall be used to calculate the amount of tax due. (6-23-94)

a. One (1) therm of natural gas will be the equivalent of one (1) gallon of liquid. (6-23-94)

b. Four and one-fourth (4 1/4) pounds of propane will be the equivalent of one (1) gallon of liquid. (6-23-94)

02. Equivalent BTU's. Special fuels tax on gaseous fuels will be computed based upon the equivalent BTU's per gallon of gaseous fuels. The following values will be used in a formula establishing the rate:

Gasoline	127,000	BTU's per gallon
Propane	92,000	BTU's per gallon
Natural Gas	100,000	BTU's per gallon

(Natural gas 100,000 BTU x current tax rate) = tax per therm gasoline 127,000 BTU

(Propane 92,000 BTU x current tax rate) = tax per 4 1/4 pounds gasoline 127,000 BTU

(6-23-94)

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130. DISTRIBUTOR'S FUEL TAX REPORTS (Rule 130).

01. Monthly Reports. Every licensed distributor shall file with the State Tax Commission a monthly tax report and supporting detailed schedules on forms prescribed by the State Tax Commission. The distributor must keep detailed inventory records. All reports which require the reporting of the number of gallons of motor fuels and other petroleum products shall be stated in gross gallons. With respect to the quantity of motor fuels and other petroleum products received during the month, the distributor shall include a listing of each person from

inside and/or outside Idaho supplying motor fuels and petroleum products to the distributor during the month and the number of gallons supplied by each supplier, on a load by load basis. Such reports shall contain a declaration by the person filing the report that the statements contained therein are true and are made under penalties of perjury. The report shall include the following information together with such other information as the State Tax Commission may require: (3-30-01)

a. The beginning inventory of motor fuels and other petroleum products on the first day of the month; (7-1-98)

b. The total quantity of motor fuels and other petroleum products received during the month;

c. The total quantity of motor fuels and other petroleum products disbursed to licensed distributors tax not collected or exported, and motor fuel sold to the Idaho National Guard during the month; (3-30-01)

d. The total quantity of motor fuels and other petroleum products transferred or relabeled from one (1) fuel type to another; (7-1-98)

e. The casualty loss documented with satisfactory written explanation of proof of loss; (7-1-98)

f. The ending inventory of motor fuels and other petroleum products on the last day of the month; (7-1-98)

g. The gross taxable gallons of motor fuels and other petroleum products; (7-1-98)

h. The tax-paid purchases; (7-1-98)

i. The net taxable gallons; (7-1-98)

j. The gallons of ethanol and biodiesel reported in ethanol and biodiesel blends. (5-3-03)

k. The gallons after deduction of a one percent (1%) or two percent (2%) allowance, whichever is appropriate. See Rule 140 of these rules; (7-1-99)

l. The tax computation; (7-1-98)

m. The bad debt amounts, refer to Rule 140 of these rules; (7-1-98)

n. The gaseous fuels permit fees; (7-1-98)

o. The net tax due; (7-1-98)

02. Report Due And Payment Required. The report shall be due on or before the last day of the month following the month to which the report relates. Supporting detailed schedules required by the State Tax Commission must accompany the report, together with all documentation and the payment of any tax, transfer fee, penalty or interest due. See Rule 010 of these rules relating to method of payment and requirement for payments of one hundred thousand dollars ($100,000) or more. (7-1-99)

03. Machine Tabulated Data. Machine tabulated data will be accepted in lieu of detailed schedules on State Tax Commission provided forms but only if the data is in the same format as shown on the required schedules. Before any other format may be used, the distributor must make a written request to the State Tax Commission with a copy of the format and must be granted written authorization to use that format. (7-1-98)

04. Supplemental Reports. In addition to the monthly report, a supplemental report may be filed in

those cases involving additional shipments of motor fuels and other petroleum products to the distributor. The supplemental report may be filed only when the distributor is diligent in reporting shipments in the monthly report. Only shipments received within the last five (5) days of the month may be reported in a supplemental report. Shipments received before that date will be subject to penalty if reported in the supplemental report. If a supplemental report is filed, the State Tax Commission will impose interest, but the report will not be subject to penalty. The supplemental report must be postmarked on or before the tenth day of the month following the month in which a report from which shipments were omitted was due. (7-1-98)

05. Timely Reporting. Any petroleum product shipments that are: (7-1-98)

a. Reported on a timely supplemental report shall be subject to interest but are not subject to penalty. (7-1-98)

b. Not reported on a timely monthly or supplemental report shall be subject to interest and may be subject to penalty. (7-1-99)

06. Motor Fuels-Receipts. All gasoline, gasohol, aircraft engine fuel, and undyed diesel fuel received by a distributor are subject to the fuels tax and transfer fee. All receipts of dyed diesel fuel and other petroleum products that are not subject to the special fuels tax are subject to the transfer fee. The special fuels tax is not imposed on gaseous fuels when the fuels are received. Refer to Rule 105 of these rules for the taxation and reporting of gaseous fuels used in motor vehicles. (3-30-01)

140. DEDUCTIONS (Rule 140).

01. Motor Fuels And Petroleum Products Presumed To Be Distributed. Unless the contrary is established, it shall be presumed that all motor fuels and other petroleum products imported into this state by a distributor, which are no longer in the possession of that distributor, have been distributed. If the licensed distributor has returned to the refinery or pipeline terminal motor fuels and other petroleum products on which the tax and/or transfer fee has been paid or has had an accidental loss, the licensed distributor has the burden of showing the petroleum products were returned to the refinery or pipeline terminal or documenting the accidental loss. No refund of the transfer fee will be allowed for accidental losses of motor fuels or other petroleum products. (7-1-98)

02. Distributor's And Retail Dealer's Allowances For Motor Fuels. (EFFECTIVE JULY 1, 1998) (Prior to July 1, 1998 this Subsection only applied to sales of gasoline and aircraft engine fuel.) The distributor shall certify on his report that the one percent (1%) credit allowance has been afforded the retail dealer to cover the dealer's shrinkage, evaporation, spillage or handling losses for motor fuel. The State Tax Commission shall then allow the additional one percent (1%) deduction unless a retail dealer claims that he did not receive the credit allowance. If such claim is made, the State Tax Commission shall require the licensed distributor to provide documentary proof that the one percent (1%) credit allowance has been afforded the retail dealer, and unless the distributor establishes that the credit has been afforded to the retail dealer, the deduction will be disallowed. In the case of

sales of motor fuel to retail dealers, to establish that the allowance of one percent (1%) of the tax has been passed to the purchaser, the invoice must show either: (7-1-99)

a. That the amount of the allowance has been passed on; or (7-1-98)

b. A statement that the allowance has been deducted in determining the price. (7-1-98)

03. Distributor's Allowance For Special Fuels. (EFFECTIVE UNTIL JULY 1, 1998) The distributor who reports and pays the special fuels tax retains all of the two percent (2%) allowance and is not required to pass down a portion of the allowance to the retail dealer. (7-1-99)

04. Exported Fuel. Motor fuels or other petroleum products claimed as exported from Idaho must be supported by records. Records must include the following: (7-1-98)

a. Tax reports or other evidence that will verify that the exported product was reported to and any tax due was paid to the jurisdiction into which the product was claimed to have been exported or evidence that the purchaser is a licensed distributor in the jurisdiction to which the exported product is destined; and (7-1-98)

b. Common carrier shipping documents, bills of lading, manifests, and cost billings; or (7-1-98)

c. Invoices, manifests, bills of lading or other documentation, signed by the receiving party to acknowledge receipt of the product; or (7-1-98)

d. Accounts payable or receivable information for verifying payments to common carriers or payment by out-of-state parties to verify receipt of exported product. (7-1-98)

e. In addition to the above, for a licensed distributor who maintains operations in Idaho, as well as other jurisdictions, evidence such as product inventory and transfer records must be retained to prove the transfer of product out of Idaho. (7-1-98)

05. Bad Debt Write-Off. A tax credit may be taken on the distributor's fuel tax report for fuel taxes paid on sales made after July 1, 1995. The credit is claimed when the debt has been written off for income tax purposes in the business records of the distributor. The credit may be claimed on distributor's fuel tax report each month or at the end of the distributor's tax year after a debt has been written off. (7-1-98)

a. First-in/first-out method for partial payments. When partial payments are received on a specific account that includes taxable fuel sales, non-taxable fuel sales, and/or other sales, the distributor must apply the payments to the unpaid sales on a first-in/first-out basis before claiming a bad debt credit. (7-1-98)

b. Proration of partial payments. When partial payments are received on a specific account, before and/or after a bad debt credit has been claimed on the distributor's fuel tax report, the distributor must prorate the taxable fuel sales, nontaxable fuel sales, and/or other sales which occurred on the same day or on the same invoice for each such account. (7-1-98)

150. DOCUMENTATION REQUIRED (Rule 150).

01. Retail Sales Invoices For Delivered, Bulk Plant, And Station Sales. Any distributor who sells motor fuels and other petroleum products in this state must issue an original invoice to the purchaser; provided, however, that when sales are accounted for on a monthly basis the invoices may be issued to the purchaser at the time of billing. All sales invoices for motor fuels and other petroleum products sold at retail stations, bulk plants, or delivered to the customer's location must contain the following: (7-1-98)

a. A pre-printed serial number, except when invoices are automatically assigned a consecutive serial number by a computer or similar machine when issued; (7-1-98)

b. Name and address of the distributor; (7-1-98)

c. Name of the purchaser; (7-1-98)

d. Date of sale or delivery; (7-1-98)

e. Type of fuel; (7-1-98)

f. Gallons invoiced – reported as required in Section 120 of these rules; (7-1-98)

g. Price per gallon and total amount charged. When taxable motor fuels products are sold, at least one (1) of the following must be used to establish that the Idaho state fuel tax has been charged: (7-1-98)

i. The amount of Idaho state fuels tax; (7-1-98)

ii. The rate of Idaho state fuels tax; or (7-1-98)

iii. A statement that the Idaho state fuels tax is included in the price. (7-1-98)

h. Delivered sales invoices must also contain the purchaser's address along with the Origin and Destination of the motor fuels and other petroleum products. (7-1-98)

i. The sales invoice shall contain double-faced carbons on the original of the first copy, unless invoices are automatically prepared by a computer or similar machine when issued. (7-1-98)

02. Correcting Sales Invoice Errors. When an original invoice is issued containing incorrect information, it may be canceled by a credit invoice and cross-referenced to all copies of the invoice covering the transaction being corrected. If a second sales invoice is issued, it shall show the date and serial number of the original invoice and that the second invoice is in replacement or correction thereof. (7-1-98)

03. Documentation Is Required. Failure to include all the above documentation will result in an invalid sales invoice for a tax-paid fuel claim by the distributor's customer. (7-1-98)

04. Documentation Requirements For Dyed Diesel Fuel. The state of Idaho is following the Internal Revenue Service requirements for sales of dyed diesel fuel. The Internal Revenue Code requires that a notice stating "DYED DIESEL FUEL, NONTAXABLE USE ONLY, PENALTY FOR TAXABLE USE" must be: (7-1-98)

a. Provided by the terminal operator to any person who receives dyed diesel fuel at a terminal rack of that operator; and (7-1-98)

b. Provided by any seller of dyed diesel fuel to the buyer if the fuel is located outside the bulk transfer/terminal system and is not sold from a posted retail pump; and (7-1-98)

c. Posted by a seller on any retail pump where the dyed diesel fuel is sold for use by the buyer. (7-1-98)

d. The documentation notice found in this rule must be provided at the time of removal or sale and must appear on shipping papers, bills of lading, and sales invoices accompanying the sale or removal of the fuel. Any person who fails to provide or post the required notice is presumed to know that the fuel will be used for a taxable use and is subject to penalties imposed by the Internal Revenue Service. (7-1-98)

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180. REFUNDS TO LICENSED FUEL DISTRIBUTORS (Rule 180).

01. Refund Claim. Any licensed fuel distributor believing that he has paid motor fuels taxes or transfer fees in any amount more than properly imposed may file a claim with the State Tax Commission for a refund of such excess motor fuels taxes or transfer fee on forms prescribed by the State Tax Commission. The claim for refund must conform with the requirements of this rule. (3-15-02)

02. Refund Claim Documentation. The claim must be filed on a distributor's fuel tax report and must include the full name and address of the claimant and his fuel distributor's license number. If the claim is for a casualty loss, the claim must include a detailed statement of the reason the claimant believes a refund is due. The statement should include a description of the transactions, if any, to which the motor fuel tax relates and must be filed on a distributor's fuel tax report for the period for which the claimed excess motor fuel tax or transfer fee amount was paid. The claim for refund must include a statement that

the amount refunded to the licensed fuel distributor has been, or will be, refunded by the fuel distributor to the purchaser, or that such motor fuel tax or transfer fee have never been collected from the purchaser. (3-15-02)

03. Refund As A Credit. A claimant may claim a bad debt credit for motor fuels taxes as a credit against motor fuels taxes or transfer fee due on the distributor's fuel tax report. (3-15-02)

04. Statute Of Limitation. No claim for refund will be allowed by the State Tax Commission if it is filed more than three (3) years from the time the payment of the claimed excess motor fuels taxes or transfer fee was made. The time the payment was made is the date upon which the distributor's fuel tax report relating to the payment was filed or was required to be filed, whichever occurred first. (3-15-02)

05. Appeal Procedures. No claim for refund may be filed relating to any motor fuels taxes or transfer fees that have been asserted by a Notice of Deficiency Determination. A taxpayer contending that motor fuels taxes or transfer fee have been erroneously or illegally collected by the State Tax Commission pursuant to a Notice of Deficiency Determination must seek a redetermination by using the appeal procedures required by law. (3-15-02)

06. Notice Of Denial. All claims for refund or credit will be reviewed by the State Tax Commission's staff. If the staff concludes that all or any part of the claim should not be allowed to the claimant, notice of denial of the claim shall be mailed to the claimant by certified mail. The notice shall include a statement of the reasons for the denial. When seeking an appeal or redetermination of a denial of a claimed refund or credit, the notice of denial

shall be the equivalent of a Notice of Deficiency Determination. If the taxpayer wishes to seek a redetermination of the denial notice, he must do so by filing a petition for redetermination in the manner prescribed in Idaho Administration and Enforcement Rule 300, as incorporated herein by Rule 330 of these rules. Such a petition for redetermination must be filed no later than sixty-three (63) days from the date upon which the notice of denial is mailed to, or served upon, the claimant. (7-1-98)

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250. REFUND CLAIMS - REPORTING (Rule 250).

01. Refund Claim. Consumers claiming refunds of motor fuels taxes may file the claim together with their Idaho income tax return in the manner required for gasoline tax refunds, under Section 63-2410, Idaho Code, or in the case of claimants not required to file an income tax return, in the manner required by Section 63-2410(5)(b), Idaho Code. (7-1-98)

02. Minimum Filing Period For Refund Claims. Any taxpayer entitled to a refund of motor fuels taxes may file a refund claim which covers a time period of not less than one (1) month. (7-1-98)

03. Refund May Be Claimed Only By Final Consumer. Refunds of motor fuels taxes may be claimed on Form 75 by the person who purchased and used the motor fuels upon which the tax has been paid and for which a refund may be claimed. In the case of all partnerships and any corporations filing Idaho Form 41S, relating to S Corporations, any refund of motor fuels taxes paid by the partnership or S Corporation must be claimed by the partnership or

corporation. The refund may not be applied to the individual returns filed by partners or shareholders. (7-1-98)

04. Statute Of Limitations. For limitations of time for consumers to file refund claims for motor fuels taxes, see Section 63-2410(5)(c), Idaho Code. (5-3-03)

05. Refund May Be Filed Separately. Refunds of motor fuels taxes are claimed using Form 75 and must be filed by the final purchaser and user of the motor fuels in conjunction with that person's Idaho income tax return or separately as a stand-alone refund claim. (7-1-98)

06. Refund Applied To Taxes Due. Any refund due to a consumer will be applied first to any liability due under any law administered by the State Tax Commission, including any liability under IFTA, which is due and unpaid at the time the claim is filed. In addition, no refund will be paid if the claimant has failed to file any tax return required to be filed with the State Tax Commission. Any balance of the refund exceeding taxes due shall be paid as a refund to the entity filing the return. (7-1-98)

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270. REFUND CLAIMS – DOCUMENTATION (Rule 270).

01. Refunds To Consumers. Any buyer of motor fuels, claiming a refund under Chapter 24, Title 63, Idaho Code, must retain in his records the original invoices from the seller, showing the number of gallons purchased. All invoices, except those prepared by a computer or similar machine, shall be prepared in ink or a double-faced carbon must be used between the original and first duplicate. Only one (1) original invoice may be issued for each delivery. In addition to the requirements outlined above,

each invoice must contain or show the following: (7-1-98)

a. A pre-printed serial number; (7-1-98)

b. Name and address of seller; (7-1-98)

c. Name of purchaser; (7-1-98)

d. Date of delivery; (7-1-98)

e. Type of motor fuel; (7-1-98)

f. Gallons invoiced; (7-1-98)

g. Price per gallon; (7-1-98)

h. At least one (1) of the following to establish that tax has been charged: (7-1-98)

i. The amount of Idaho state fuels tax; (7-1-98)

ii. The rate of Idaho state fuels tax; or (7-1-98)

iii. A statement that the Idaho state fuels tax is included in the price. (7-1-98)

02. Corrected Invoices. No altered or corrected invoice will be accepted for refund purposes. When errors occur, the original invoice must not be altered or corrected, but must be voided and a new original invoice issued. All altered or corrected invoices must be marked as voided and retained by the seller for at least three (3) years from the date issued. (7-1-98)

03. Invoice Retention. The original invoices required by Subsection 270.01 of this rule shall be retained for the greater of either three (3) years or the time during which the taxpayer's Idaho income tax return is

subject to adjustment by either the State Tax Commission or by voluntary action of the taxpayer. (7-1-98)

04. Refund Documents. For refund claims under Section 63-2410(5)(c), Idaho Code, an original invoice includes any duplicate of the original that is created with the same impression as the original, for example, with carbon paper or NCR paper, if the original is retained by the seller and only the duplicate is provided to the customer. An original invoice does not include any document produced by a copy machine or similar device capable of producing a copy of an existing document. (7-1-98)

05. Records Required For Motor Fuels Tax Refunds. Each claimant shall maintain records that are sufficient to prove the accuracy of the fuels tax refund claim. Such records shall include all motor fuels receipts, the gallons of tax-paid fuel used in each type of equipment, both refundable and nonrefundable, and other uses. The records must show the date of receipt or disbursements and identify the equipment into which the tax-paid fuel is dispensed. Failure of the claimant to maintain the required records and to provide them for examination is a waiver of all rights to the refund. The following rules shall govern records maintained to support claims for refund. (7-1-98)

a. Use of fuel from a single storage tank. Tax-paid fuel (other than fuel purchased by persons who operate motor vehicles that are over twenty-six thousand (26,000) pounds maximum gross weight) purchased and delivered into a single bulk storage tank and withdrawn for both nontaxable and taxable uses must be accounted for using either the proration provided by this paragraph or by records showing actual taxable and nontaxable usage. If the proration is used, sixty percent (60%) of all taxed

diesel fuel or twenty-five percent (25%) of all taxed gasoline delivered into bulk storage shall be presumed to be for exempt uses unless another percentage is requested by the taxpayer and authorized by the State Tax Commission. The request shall itemize anticipated uses by type of equipment based on previously experienced use. The State Tax Commission will refund taxes paid on the percentage of taxed fuel presumed to be exempt. If refunds are claimed based on records of actual use, the records must be made available upon request. In either case, invoices showing the fuel purchases on which tax was paid must be retained to support each refund claim. (7-1-98)

b. Use of fuel from multiple storage tanks. When separate bulk storage tanks are maintained for both exempt and taxable uses, the seller must mark the invoices at the time of delivery, identifying the storage tanks into which the fuel was delivered. Detailed withdrawal records will only be required if fuel is used by motor vehicles licensed under IFTA. All fuel invoices must be retained as required by Subsection 270.03 of this rule. Exempt fuel may not be used in motor vehicles licensed or required to be licensed. (7-1-98)

c. Use of fuel for other than bulk storage. Fuel dispensed into small containers for use in, or into the supply tank of, stationary engines, equipment, commercial motor boats, or vehicles other than licensed motor vehicles, must be identified on the purchase invoice. No other records will be required. (7-1-98)

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280. REFUNDS TO CONSUMERS FOR NONTAXABLE USES OF MOTOR FUELS (Rule 280).

The Idaho Form 75 must be used to claim a fuels tax refund for all nontaxable uses of Idaho tax-paid motor fuels, except for refunds claimed by IFTA licensees for nontaxable miles which must be claimed on the licensee's IFTA return. (5-3-03)

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290. RECORDS REQUIRED FOR INTRASTATE SPECIAL FUELS USERS CLAIMING REFUNDS FOR NONTAXABLE SPECIAL FUELS USED IN MOTOR VEHICLES (Rule 290.)

01. Refund Claims, Required Records. Special fuel users, except IFTA licensees, must file a Form 75 with the relevant supplemental worksheet to claim a fuels tax refund. The following information is required to qualify for a refund except for claims based only on the power take-off allowances provided for in Rule 292 of these rules. (4-5-00)

a. Total miles. The total miles traveled should be included for motor vehicles which have nontaxable uses of special fuels. Special fuel users who qualify to use one of the "Standard MPGs" found in Subsection 290.02 need only record and report Idaho taxable miles. (4-5-00)

b. Total fuel. The total number of gallons of fuel delivered into the supply tanks of the motor vehicles should be included for motor vehicles which have nontaxable uses of special fuels. The total miles figure and the total fuel figure must be for the same vehicles. (7-1-98)

c. Actual miles per gallon. The miles per gallon shall be computed by dividing gallons determined according to Subsection 290.01.b. into the number of miles determined

according to Subsection 290.01.a. The computation of fleet miles per gallon should be carried to three (3) decimal places and rounded to two (2) decimal places. Example: 4.514 = 4.51 and 4.515 = 4.52. (4-5-00)

d. Statutory miles per gallon. In the event that the claimant fails to keep sufficiently detailed records showing the number of miles actually operated per gallon of special fuel consumed, it shall be presumed that one (1) gallon of special fuel was consumed for every: (4-5-00)

i. Four (4) miles traveled by vehicles over forty thousand (40,000) pounds gross registered vehicle weight; or (7-1-98)

ii. Five and one-half (5 1/2) miles traveled by vehicles from twenty-six thousand one (26,001) to forty thousand (40,000) pounds gross registered vehicle weight; or (7-1-98)

iii. Seven (7) miles traveled by vehicles from twelve thousand one (12,001) to twenty-six thousand (26,000) pounds gross registered vehicle weight; or (7-1-98)

iv. Ten (10) miles traveled by vehicles from six thousand one (6,001) to twelve thousand (12,000) pounds gross registered vehicle weight; or (7-1-98)

v. Sixteen (16) miles traveled by vehicles six thousand (6,000) pounds or less gross registered vehicle weight. (7-1-98)

e. The total taxable miles traveled in Idaho. Only taxable miles traveled in Idaho by the motor vehicles which have nontaxable uses of special fuels should be included. Taxable miles are miles driven on any road that is open to the use of the public and maintained by a governmental entity. Such roads may be constructed using

concrete, asphalt, gravel, composition, dirt, or other surfaces. (7-1-98)

f. The number of gallons of special fuels consumed in Idaho. The gallons consumed in Idaho shall be computed by dividing the miles per gallon determined according to Subsection 290.01.c. and 290.01.d. into the total taxable miles in Idaho according to Subsection 290.01.e. (4-5-00)

02. Alternative Refund Calculation For Special Fuels Users Engaged In Certain Industries. A special rule may be applied for motor vehicles, except IFTA licensees, that use special fuels and accrue both taxable and nontaxable miles. Operators of motor vehicles that use special fuels, except those licensed under IFTA, may, instead of using the computations provided in Subsections 290.01.c. and 290.01.d., presume that when engaged in operations in the following industries and accruing taxable miles in Idaho, that such motor vehicles consume fuel at the following rates:

Logging	4.3 MPG
Agricultural	4.5 MPG
Sand, gravel & rock hauling	4.0 MPG
Construction	4.4 MPG

(4-5-00)

03. Actual MPG Calculation. If an operator has reason to believe the standard on-road miles per gallon (MPG) in Subsection 290.02. is not an accurate reflection of his specific operation, the operator can calculate an actual MPG using the computations provided in Subsection 290.01.c. or statutory MPG provided in Subsection 290.01.d. (4-5-00)

04. Claims Subject To Review Or Audit. All fuels tax refund claims are subject to review or audit by the State Tax Commission. (4-5-00)

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292. CALCULATION OF REFUNDS FOR NONTAXABLE USES OF MOTOR FUELS IN MOTOR VEHICLES. (RULE 292).

01. Fuel Records Required For Refund Claims. Special fuels users may be eligible for a fuels tax refund of tax-paid special fuels if their motor vehicles have accrued nontaxable miles or have power-take-off (PTO) equipment. Records must be kept as described in Subsection 290.01 of these rules. (4-5-00)

02. Nontaxable Miles Defined. Nontaxable miles are miles driven on roads which are not open to the public, not maintained by a governmental entity, located on private property that are maintained by the property owner, or defined in Subsection 292.03. Miles driven on a construction site would also be considered nontaxable miles and may be eligible for a special fuels tax refund. See Rule 130 of these rules regarding application of Idaho Sales and Use Taxes. (4-5-00)

03. Additional Nontaxable Roadways. Roadways defined in Section 63-2401, Idaho Code, include those constructed and maintained by the United States Forest Service, the United States Bureau of Land Management, the Idaho Department of Lands, or forest protective associations with which the state of Idaho has contracted or become a member pursuant to Chapter 1, Title 38, Idaho Code. The special fuels user must maintain records documenting nontaxable miles traveled on roadways that

qualify for exclusion under this provision, unless using the "standard MPG" for its industry found in Subsection 290.02 of these rules. When special fuels users compute their special fuels tax liability or refund, they may exclude from total taxable miles traveled in Idaho the miles traveled on these roadways if the cost of maintaining the roadway pursuant to a contract or permit is primarily borne by them or if the special fuel user is a subcontractor of a prime contractor required by contract to bear the primary cost of maintaining the roadway. (3-15-02)

04. Calculation. Determine the number of taxable miles driven in Idaho following the procedure established in Subsection 290.01 of these rules. Divide this number by the actual MPG, the statutory MPG established by Subsection 290.01 of these rules, or the industry standard MPG provided by Subsection 290.02 of these rules. Subtract this number of gallons from the total Idaho tax-paid gallons purchased for the subject vehicles. (4-5-00)

05. Power-Take-Off And Auxiliary Engine Allowances (Allowances). Power take-off (PTO) allowances are available for special fuels powered vehicles. Auxiliary engine allowances are available for both special fuels and gasoline powered vehicles. (4-5-00)

a. Standard Allowances For Special Fuels. Nontaxable gallons of special fuels may be claimed when special fuels are used for purposes other than to operate or propel a motor vehicle and the fuel is drawn from the main supply tank of the motor vehicle. Examples of uses that qualify for allowances are turning a vehicle-mounted cement mixer or off-loading product. (4-5-00)

b. Standard Allowances For Gasoline. Nontaxable gallons of gasoline may be claimed when gasoline is used

in an auxiliary engine and the fuel is drawn from the main supply tank of the licensed motor vehicle. No claim for gasoline is allowed when gasoline is used by the licensed motor vehicle's main engine even to operate the motor vehicle's PTO unit. (3-15-02)

c. Rates For Standard Allowances. The number of gallons of fuel actually delivered into the fuel tank of the vehicle may be reduced by the following allowances: (4-5-00)

i. Allowances based on unit quantities:

Allowance Type	Allowance Rates	x	Unit Quantities
Gasoline/fuel oil	0.00015 gallons	x	Gallons pumped
Bulk cement	0.1858 gallons	x	Tons pumped
Refrigeration unit/reefer	0.75 gallons	x	Hours unit operated
Tree length timber/logs	0.0503 gallons	x	Tons Hauled
Tree length timber/logs	3.46 gallons	X	Hours unit operated
Carpet cleaning	0.75 gallons	X	Hours unit operated

(3-15-02)

ii. Allowances based on percentages:

Allowance Type	Percentage Per Gallon	x	Gallons Consumed
Concrete mixing	30%	x	Gallons consumed
Garbage compaction	25%	x	Gallons consumed

(3-15-02)

06. Non-Standard Allowances. A request for an allowance not listed in Subsection 292.05 or greater than

those listed must be submitted by the taxpayer to the State Tax Commission for approval before being used. Taxpayers must request approval of the proposed allowance in writing with a copy of the supporting calculations used to compute the proposed allowance. Taxpayers must send requests for approval to:

FUELS TAX POLICY
IDAHO STATE TAX COMMISSION
P. O. BOX 36
BOISE, ID 83722-0036

The Idaho State Tax Commission may request additional information or documentation as needed in order to make a determination on the request. (4-5-00)

07. Nontaxable Gallons Of Fuel Claimed By Non-IFTA Licensees. The nontaxable gallons of fuel claimed by non-IFTA licensees may be the allowance gallons listed in Subsections 292.05 and 292.06 and/or the gallons calculated under Subsection 292.04. Only actual MPGs, computed by adjusting total fuel as defined in Subsection 292.01 by the allowance gallons, may be used to calculate a fuels tax refund based on both nontaxable miles and allowances. Fuels tax refunds based solely on an allowance may be calculated without regard to mileage and fuel consumption (MPG) information. (4-5-00)

08. IFTA Licensees Qualifying For Power Take-Off (PTO) And Auxiliary Engine Allowances (Allowances). Allowances listed in Subsection 292.05 or established as provided in Subsection 292.06 may be granted for IFTA licensees by recomputing the total gallons of fuel consumed in all jurisdictions. IFTA licensees claiming refunds of Idaho fuels tax resulting from the allowances established in Subsections 292.05 and 292.06, must file the

claim on an Idaho Fuels Use Report Form 75 with the relevant supplemental worksheet. (4-5-00)

a. The IFTA licensee must recompute the total taxable fuel for Idaho by deducting the gallons determined by the allowances in all jurisdictions from the total number of gallons of fleet fuel consumed that was reported on the IFTA return. Using the new net gallons consumed, recompute the fleet miles per gallon. Apply the new fleet miles per gallon to the reported Idaho taxable miles to calculate the corrected Idaho taxable gallons. To calculate the Idaho nontaxable gallons available for refund, the licensee must subtract the recomputed taxable gallons for Idaho from the original taxable gallons reported for Idaho. This nontaxable gallon figure is then entered on the line labeled nontaxable gallons on the Form 75. (4-5-00)

b. Additionally, a copy of the IFTA tax return for the period subject to the refund claim and a statement or worksheet showing how allowance was calculated must be included as an attachment to the Form 75. All refund claims are subject to review and audit, therefore, adequate documentation must be retained by the licensee. (4-5-00)

c. IFTA licensees that used an assumed MPG when preparing their original IFTA return may not claim any additional refund. (4-5-00)

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300. ADMINISTRATION, RULES AND DELEGATION OF AUTHORITY (Rule 300).

01. Rules Do Not Stand Alone. Where statutes appear to be clear and unambiguous without need for interpretation, expansion or construction, no rules have been promulgated. An effort has been made to prevent the

rules from being merely repetitive of statutory provisions. Consequently, the rules do not stand alone as a statement of the motor fuels tax laws of this state. Instead, each rule must be read together with the statute to which it relates. The titles that introduce each rule are provided for the convenience of the reader and are not part of the rules. (6-23-94)

02. Transportation Department Personnel As Deputies Of The Commission. Pursuant to the authority of Sections 63-2434 and 63-2442, Idaho Code, those individuals employed by the Idaho Transportation Department in the operation of stationary or mobile Ports of Entry are designated as deputies of the Commission for exercising the powers necessary to enforce the provisions of the special fuels tax laws. Such authority includes exercise of the powers described in Rule 400 of these rules. (6-23-94)

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330. INCORPORATION BY REFERENCE OF RELEVANT INCOME TAX RULES (Rule 330).

Section 63-2434, Idaho Code, incorporates by reference various provisions of the Idaho Income Tax Act to apply to administering and enforcing the taxes on motor fuels. For applying and construing those sections as they apply to taxes on motor fuels, the administration and enforcement rules previously promulgated or to be promulgated or amended by the Commission are hereby adopted as part of these rules as if set out in full. In addition, Administration and Enforcement Rule 110 (IDAPA 35.02.01.110) is hereby adopted as part of these rules as if set out in full. (7-1-97)

LEGISLATURE OF THE STATE OF IDAHO
Fifty-sixth Legislature Second Regular Session - 2002

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 732

BY WAYS AND MEANS COMMITTEE

An Act Relating To Motor Fuels Taxes; Providing A Statement Of Legislative Intent; Amending Section 63-2402, Idaho Code, To Change The Legal Incidence Of Taxes On Gasoline And Special Fuels By Placing It On The Distributor Who First Receives The Fuel In Idaho And To Provide Exemptions; Amending Section 63-2401, Idaho Code, As Amended By Section 1, Chapter 30, Laws Of 2002, To Amend The Definition Of "Distributor"; Amending Section 63-2403, Idaho Code, To Clarify When Motor Fuel Is Received; Amending Section 63-2405, Idaho Code, As Amended By Section 2, Chapter 30, Laws Of 2002, To Clarify The Responsibility For Payment Of Motor Fuels Taxes; Amending Section 63-2412, Idaho Code, To Clarify The Distribution Of Revenues From Taxes On Gasoline; Repealing Section 63-2416, Idaho Code, Relating To The Imposition Of Tax On Special Fuel; Amending Section 63-2418, Idaho Code, To Clarify The Distribution Of Revenues From Taxes On Special Fuel; Amending Section 63-2421, Idaho Code, As Amended By Section 5, Chapter 30, Laws Of 2002, To Impose Use Taxes On Untaxed Motor Fuel And To Clarify The Reporting And Payment Of Fuel Use Taxes; Amending Section 63-2424, Idaho Code, Relating To Gaseous Fuels And To Change A Cross Reference; Amending Section 63-2425, Idaho Code, Relating To Prohibiting Use Of Dyed Or Untaxed Fuel On A Highway And To Correct Cross References; Amending Section 63-2443, Idaho Code, To Provide Penalties For Certain Retail

Dealers Who Accept Or Receive Untaxed Motor Fuel And For Unauthorized Sale Of Untaxed Motor Fuel; Providing Severability; Declaring An Emergency And Providing A Retroactive Effecting Date.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. STATEMENT OF INTENT. The Legislature intends by this act to modify the holding of the Idaho Supreme Court in the case of Goodman Oil Company of Lewiston, *et al* v. Idaho State Tax Commission, 136 Idaho 53, (June 8, 2001). Specifically the Legislature intends, by this act, to expressly impose the legal incidence of motor fuels taxes upon the motor fuel distributor who receives (as "receipt" is defined in Section 63-2403, Idaho Code) the fuel in this state and to make other coordinating and technical changes to the motor fuels tax laws.

SECTION 2. That Section 63-2402, Idaho Code, be, and the same is hereby amended to read as follows:

63-2402. IMPOSITION OF TAX UPON ~~*USE*~~ **MOTOR FUEL**.

(1) A tax is hereby imposed ~~*for the privilege of using the public highways upon the use or possession for use of gasoline, and*~~ **upon the receipt of motor fuel in this state by any distributor receiving motor fuel upon which the tax imposed by this section has not previously been paid. T**~~*t*~~he tax shall be imposed without regard to whether use is on a governmental basis or otherwise**, unless exempted by this chapter**.

(2) The tax imposed in this section shall be at the ~~*same*~~ rate ~~*as specified in section 63-2405, Idaho Code, upon each*~~ **of twenty-five cents (25¢) per** gallon of ~~*gasoline used or possessed for use*~~ **motor fuel received**.

This tax shall be subject to the **exemptions,** deductions and refunds set forth in this chapter. **The tax shall be paid by distributors upon the distributor's receipt of the motor fuel in this state.**

(3) Any person coming into this state in a motor vehicle may transport in the manufacturer's original tank of that vehicle, for his own use only, not more than thirty (30) gallons of ~~*gasoline*~~ **motor fuel** for the purpose of operating that motor vehicle, without complying with the provisions of this chapter.

(4) ~~*This use tax shall be a debt owing from the user to the state of Idaho*~~ **The tax imposed in subsection (1) of this section does not apply to:**

(a) Special fuels that have been dyed at a refinery or terminal under the provisions of 26 U.S.C. section 4082 and regulations adopted thereunder, or under the clean air act and regulations adopted thereunder except as provided in section 63-2425, Idaho Code; or

(b) Special fuel dispensed into a motor vehicle which uses gaseous special fuels and which displays a valid gaseous special fuels permit under section 63-2424, Idaho Code; or

(c) Special fuels that are gaseous special fuels, as defined in section 63-2401, Idaho Code, except that part thereof that is delivered into the fuel supply tank or tanks of a motor vehicle; or

(d) Aircraft engine fuel subject to tax under section 63-2408, Idaho Code.

SECTION 3. That Section 63-2401, Idaho Code, as amended by Section 1, Chapter 30, Laws of 2002, be, and the same is hereby amended to read as follows:

63-2401. DEFINITIONS. In this chapter:

(1) "Aircraft engine fuel" means:

(a) Aviation gasoline, defined as any mixture of volatile hydrocarbons used in aircraft reciprocating engines; and

(b) Jet fuel, defined as any mixture of volatile hydrocarbons used in aircraft turbojet and turboprop engines.

(2) "Biodiesel" means any fuel or mixture of fuels that is:

(a) Derived in whole or in part from agricultural products or animal fats or the wastes of such products; and

(b) Suitable for use as fuel in diesel engines.

(3) "Bond" means:

(a) A surety bond, in an amount required by this chapter, duly executed by a surety company licensed and authorized to do business in this state conditioned upon faithful performance of all requirements of this chapter, including the payment of all taxes, penalties and other obligations arising out of the provisions of this chapter; or

(b) A deposit with the commission by any person required to be licensed pursuant to this chapter under terms and conditions as the commission may prescribe, of a like amount of lawful money of the United States or

bonds or other obligations of the United States, the state of Idaho, or any county of the state; or

(c) An irrevocable letter of credit issued to the commission by a bank doing business in this state payable to the state upon failure of the person on whose behalf it is issued to remit any payment due under the provisions of this chapter.

(4) "Commercial motor boat" means any boat, equipped with a motor, which is wholly or partly used in a profit-making enterprise or in an enterprise conducted with the intent of making a profit.

(5) "Commission" means the state tax commission of the state of Idaho.

(6) "Distributor" means any person who receives ~~*gasoline, special fuels, and/or aircraft*~~ **motor** fuel in this state, and includes a special fuels dealer. Any person who sells or receives gaseous fuels will not be considered a distributor unless the gaseous fuel is delivered into the fuel tank or tanks of a motor vehicle not then owned or controlled by him.

(7) "Dyed fuel" means diesel fuel that is dyed pursuant to requirements of the internal revenue service, or the environmental protection agency.

(8) "Exported" means delivered by truck or rail across the boundaries of this state by or for the seller or purchaser from a place of origin in this state.

(9) "Gasohol" means gasoline containing a mixture of no more than ten percent (10%) blend anhydrous ethanol.

(10) "Gasoline" means any mixture of volatile hydrocarbons suitable as a fuel for the propulsion of motor vehicles or motor boats. "Gasoline" also means aircraft engine fuels when used for the operation or propulsion of motor vehicles or motor boats and includes gasohol, but does not include special fuels.

(11) "Highways" means every place of whatever nature open to the use of the public as a matter of right for the purpose of vehicular travel which is maintained by the state of Idaho or an agency or taxing subdivision or unit thereof or the federal government or an agency or instrumentality thereof. Provided, however, if the cost of maintaining a roadway is primarily borne by a special fuels user who operates motor vehicles on that roadway pursuant to a written contract during any period of time that a special fuels tax liability accrues to the user, such a roadway shall not be considered a "highway" for any purpose related to calculating that user's special fuel's tax liability or refund.

(12) "Imported" means delivered by truck or rail across the boundaries of this state by or for the seller or purchaser from a place of origin outside this state.

(13) "International fuel tax agreement" and "IFTA" mean the international fuel tax agreement required by the intermodal surface transportation efficiency act of 1991, Public Law 102-240, 105 Stat. 1914, and referred to in title 49, U.S.C., section 31701, including subsequent amendments to that agreement.

(14) "Jurisdiction" means a state of the United States, the District of Columbia, a province or territory of Canada, or a state, territory or agency of Mexico in the

event that the state, territory or agency participates in the international fuel tax agreement.

(15) "Licensed distributor" means any distributor who has obtained a license under the provisions of section 63-2427A, Idaho Code.

(16) "Motor fuel" means gasoline, special fuels, aircraft engine fuels or any other fuels suitable for the operation or propulsion of motor vehicles, motor boats or aircraft.

(17) "Motor vehicle" means every self-propelled vehicle designed for operation, or required to be licensed for operation, upon a highway.

(18) "Person" means any individual, firm, fiduciary, copartnership, association, limited liability company, corporation, governmental instrumentality including the state and all of its agencies and political subdivisions, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intent to give a more limited meaning is disclosed by the context. Whenever used in any clause prescribing and imposing a fine or imprisonment, or both, the term "person" as applied to an association means the partners or members, and as applied to corporations, the officers.

(19) "Recreational vehicle" means a snowmobile as defined in section 67-7101, Idaho Code; a motor driven cycle or motorcycle as defined in section 49-114, Idaho Code; and any vehicular type unit either as an integral part of, or required for the movement of, units defined in section 39-4105(15), Idaho Code.

(20) "Retail dealer" means any person engaged in the retail sale of motor fuels to the public or for use in the state.

(21) "Special fuels" means:

(a) All fuel suitable as fuel for diesel engines;

(b) A compressed or liquified gas obtained as a byproduct in petroleum refining or natural gasoline manufacture, such as butane, isobutane, propane, propylene, butylenes, and their mixtures; and

(c) Natural gas, either liquid or gas, and hydrogen, used for the generation of power for the operation or propulsion of motor vehicles.

(22) "Special fuels dealer" means "distributor" under subsection (6) of this section.

(23) "Special fuels user" means any person who uses or consumes special fuels for the operation or propulsion of motor vehicles owned or controlled by him upon the highways of this state.

(24) "Use" means either:

(a) The receipt, delivery or placing of fuels by a licensed distributor or a special fuels dealer into the fuel supply tank or tanks of any motor vehicle not owned or controlled by him while the vehicle is within this state; or

(b) The consumption of fuels in the operation or propulsion of a motor vehicle on the highways of this state.

SECTION 4. That Section 63-2403, Idaho Code, be, and the same is hereby amended to read as follows:

63-2403. RECEIPT OF ~~*GASOLINE, SPECIAL FUELS OR AIRCRAFT ENGINE*~~ **MOTOR** FUEL – DETERMINATION. ~~*Gasoline, special fuels or aircraft engine*~~ **Motor** fuel is received as follows:

(1) (a) ~~*Gasoline, special fuels or aircraft engine*~~ **Motor** fuel produced, refined, manufactured, blended or compounded by any person or stored at a pipeline terminal in this state by any person is received by that person when it is loaded into tank cars, tank trucks, tank wagons or other types of transportation equipment or when it is placed into any tank or other container from which sales or deliveries not involving transportation are made.

(b) ~~*Gasoline, special fuels or aircraft engine*~~ **Motor** fuel is received by a person other than the person designated in subsection (1)(a) of this section in the following circumstances:

(i) ~~*Gasoline, special fuels or aircraft engine*~~ **Motor** fuel delivered from a pipeline terminal in this state to a licensed distributor is received by the licensed distributor to whom it is first delivered.

(ii) ~~*Gasoline, special fuels or aircraft engine*~~ **Motor** fuel delivered to a person who is not a licensed distributor for the account of a person that is so licensed, is received by the licensed distributor for whose account it is shipped.

(2) Notwithstanding the provisions of subsection (1) above, ~~*gasoline, special fuels or aircraft engine*~~ **motor** fuel shipped or delivered from a refinery or pipeline terminal to another refinery or pipeline terminal, is not received by reason of that shipment or delivery.

(3) Any product other than ~~*gasoline, special fuels or aircraft engine*~~ **motor** fuel that is blended to produce

~~*gasoline, special fuels or aircraft engine*~~ ***motor*** fuel other than at a refinery or pipeline terminal in this state is received by the person who is the owner of the blended fuel after the blending is completed.

(4) (a) ~~*Gasoline, special fuels or aircraft engine*~~ **Motor** fuel imported into this state, other than fuel placed in storage at a refinery or pipeline terminal in this state, is received at the time the fuel arrives in this state by the person who is, at the time of arrival, the owner of the fuel.

(b) ~~*Gasoline, special fuels or aircraft engine*~~ **Motor** fuel imported into this state by a licensed distributor and delivered directly to a person not a licensed distributor is received by the licensed distributor importing that fuel into this state at the time the fuel arrives in this state.

(c) Fuel arrives in this state at the time it crosses the border of this state.

SECTION 5. That Section 63-2405, Idaho Code, as amended by Section 2, Chapter 30, Laws of 2002, be, and the same is hereby amended to read as follows:

63-2405. ~~*IMPOSITION*~~ **PAYMENT** OF TAX. ~~*An*~~ **The** excise tax ~~*is hereby*~~ imposed ~~*on all gasoline received. The tax*~~ **by section 63-2402, Idaho Code,** is to be paid by the ~~*licensed*~~ distributor, and measured by the total number of gallons of ~~*gasoline*~~ **motor fuel** received by him, at the rate ~~*of twenty-five cents (25¢) per gallon*~~ **specified in section 63-2402, Idaho Code**. That tax, together with any penalty and/or interest due, shall be remitted with the monthly distributor's report required in section 63-2406, Idaho Code.

SECTION 6. That Section 63-2412, Idaho Code, be, and the same is hereby amended to read as follows:

63-2412. DISTRIBUTION OF TAX REVENUES **FROM TAX ON GASOLINE AND AIRCRAFT ENGINE FUEL**.

(1) The revenues received from the taxes imposed by sections 63-2402 and 63-24~~05~~**21**, Idaho Code**, upon the receipt or use of gasoline**, and any penalties, interest, or deficiency additions, ~~*or from the fees imposed by the commission under the provisions of section 63-2409, Idaho Code,*~~ shall be distributed periodically as follows:

(a) An amount of money equal to the actual cost of collecting, administering and enforcing the gasoline tax requirements by the commission, as determined by it shall be retained by the commission. The amount retained by the commission shall not exceed the amount authorized to be expended by appropriation by the legislature. Any unencumbered balance in excess of the actual cost of collecting, administering and enforcing the gasoline tax requirements by the commission at the end of each fiscal year shall be distributed as listed in paragraph (e) of this subsection.

(b) An amount of money shall be distributed to the state refund account sufficient to pay current refund claims. All refunds authorized by the commission to be paid shall be paid from the state refund account and those moneys are hereby continuously appropriated for that purpose.

(c) As soon as possible after the beginning of each fiscal year, the sum of two hundred fifty thousand dollars ($250,000) shall be distributed to the railroad grade crossing protection account in the dedicated fund, to pay the amounts from the account pursuant to the provisions of section 62-304C, Idaho Code.

(d) As soon as possible after the beginning of each fiscal year, the sum of one hundred thousand dollars ($100,000) shall be distributed to the local bridge inspection account in the dedicated fund, to pay the amounts from the account pursuant to the provisions of section 40-703, Idaho Code.

(e) From the balance remaining with the commission after distributing the amounts in paragraphs (a) through (d) of subsection (1) of this section:

1. One and twenty-eight hundredths percent (1.28%) shall be distributed as follows: sixty-six percent (66%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed to the waterways improvement account, as created in chapter 15, title 57, Idaho Code. Up to twenty percent (20%) of the moneys distributed to the waterways improvement account under the provisions of this paragraph may be used by the department of parks and recreation to defray administrative costs. Any moneys unused at the end of the fiscal year by the department of parks and recreation shall be returned to the state treasurer for deposit in the waterways improvement account. Thirty-three percent (33%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed into the park and recreation capital improvement account as created in section 57-1801, Idaho Code. One percent (1%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed to the search and rescue fund created in section 67-2913, Idaho Code;

2. One and twenty-eight hundredths percent (1.28%) shall be distributed as follows: sixty-six percent (66%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed to the off-road motor vehicle account, as

created in section 57-1901, Idaho Code. Up to twenty percent (20%) of the moneys distributed to the off-road motor vehicle account by this subparagraph may be used by the department of parks and recreation to defray administrative costs. Any moneys unused at the end of the fiscal year by the department of parks and recreation shall be returned to the state treasurer for deposit in the off-road motor vehicle account. Thirty-three percent (33%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed into the park and recreation capital improvement account as created in section 57-1801, Idaho Code. One percent (1%) of the one and twenty-eight hundredths percent (1.28%) shall be distributed to the search and rescue fund created in section 67-2913, Idaho Code; and

3. Forty-four hundredths percent (.44%) shall be distributed to the park and recreation capital improvement account as created in section 57-1801, Idaho Code, to be used solely to develop, construct, maintain and repair roads, bridges and parking areas within and leading to parks and recreation areas of the state.

4. The balance remaining shall be distributed to the highway distribution account created in section 40-701, Idaho Code.

(2) The revenues received from the taxes imposed by section 63-2408, Idaho Code, and any penalties, interest, and deficiency amounts, shall be distributed as follows:

(a) An amount of money shall be distributed to the state refund account sufficient to pay current refund claims. All refunds authorized by the commission to be paid shall be paid from the state refund account, and those moneys are hereby continuously appropriated.

(b) The balance remaining of all the taxes collected shall be distributed to the state aeronautics account, as provided in section 21-211, Idaho Code.

SECTION 7. That Section 63-2416, Idaho Code, be, and the same is hereby repealed.

SECTION 8. That Section 63-2418, Idaho Code, be, and the same is hereby amended to read as follows:

63-2418. DISTRIBUTION OF TAX REVENUES **FROM TAX ON SPECIAL FUELS**. The revenues received from the tax imposed by ~~*section 63-2416, Idaho Code,*~~ **this chapter upon the receipt of special fuel** and any penalties, interest, or deficiency additions, or from the fees imposed by the commission under the provisions of section **63-2424 or** 63-2438, Idaho Code, shall be distributed as follows:

(1) An amount of money equal to the actual cost of collecting, administering and enforcing the special fuels tax provisions by the commission, as determined by it shall be retained by the commission. The amount retained by the commission shall not exceed the amount authorized to be expended by appropriation by the legislature. Any unencumbered balance in excess of the actual cost of collecting, administering and enforcing the special fuels tax requirements by the commission at the end of each fiscal year shall be distributed to the highway distribution account.

(2) An amount of money shall be distributed to the state refund account sufficient to pay current refund claims. All refunds authorized by the commission to be paid under this chapter shall be paid from the state refund

account, those moneys being hereby continuously appropriated.

(3) The balance remaining with the commission after distributing the amounts specified in subsections (1) and (2) of this section shall be distributed to the highway distribution account, established in section 40-701, Idaho Code.

SECTION 9. That Section 63-2421, Idaho Code, as amended by Section 5, Chapter 30, Laws of 2002, be, and the same is hereby amended to read as follows:

63-2421. **USE TAX –** RETURNS AND PAYMENT OF USE TAX BY CONSUMERS.

(1) **For the privilege of using the highways of this state,** a~~A~~ny person who consumes ~~*special*~~ **motor** fuels in a motor vehicle licensed or required to be licensed by the laws of this state, **or which is required to be licensed under the laws of this state and is operated on the highways of this state upon which the tax imposed by section 63-2402, Idaho Code, has not been paid or is subject to credit or refund under IFTA and which fuel is not exempted from tax by this chapter, shall be liable for the tax.**

(2) Eexcept for motor vehicles licensed under IFTA or operating with a temporary permit under section 49-432, Idaho Code, ~~*which is subject to the tax imposed by section 63-2416, Idaho Code,*~~ **persons liable under subsection (1) of this section** shall report the amount of tax liability and pay the taxes due in conjunction with his income or franchise tax return due under the provisions of chapter 30, title 63, Idaho Code, in the manner and form prescribed by the commission. Payment of ~~*special*~~ **motor**

fuels taxes shall be made in conjunction with any other taxes due on that return and ~~special~~ **motor** fuels taxes due may be offset against refunds of any other taxes shown on the return to be due the taxpayer.

(~~2~~3) In the case of a person **liable under subsection (1) of this section** other than one who consumes ~~special~~ **motor** fuels in a motor vehicle described in the exception in subsection (~~1~~2) of this section and not required to file a return under chapter 30, title 63, Idaho Code, ~~who is subject to the tax imposed by section 63-2416, Idaho Code,~~ the tax shall be paid annually, on a calendar year basis, in the manner and form required by the commission. The return and payment for each calendar year shall be due on or before April 15 of the immediately succeeding calendar year.

(4) In the case of a person liable under subsection (1) of this section whose motor vehicles are licensed or required to be licensed under IFTA as provided in sections 63-2438 and 63-2439, Idaho Code, or operating with a temporary permit under section 49-432, Idaho Code, the tax shall be paid in the manner required by those provisions.

SECTION 10. That Section 63-2424, Idaho Code, be, and the same is hereby amended to read as follows:

63-2424. GASEOUS FUELS.

(1) In the case of special fuels which are in a gaseous form, the commission shall provide by rule the method to be used for converting the measurement of the fuel to the equivalent of gallons for the purpose of applying tax rates. The method provided shall cause the tax rate provided in section 63-240~~5~~2, Idaho Code, to apply to an amount of

gaseous fuels having energy equal to one (1) gallon of gasoline.

(2) As an alternative to the provisions of subsection (1) of this section, an annual fee in lieu of the excise tax may be collected on a vehicle powered by gaseous fuels. The rate of the fee shall be based on the following schedule for all types of gaseous fuels as adjusted by the formula for proration set out below. The permits shall be sold by gaseous fuels vendors dispensing gaseous fuels into motor vehicles.

VEHICLE TONNAGE (GVW)	FEE
0 – 8,000	$ 60.00
8,001 – 16,000	$ 89.00
16,001 – 26,000	$179.00
26,001 and above	$208.00

Permits for vehicles which are converted to gaseous fuels after the first of July in any year shall have the fee prorated for the appropriate number of months until renewal. The commission shall provide by rule the method to be used for converting the measurement of fuel to the equivalent of gallons for the purpose of applying increases in tax rates after this law becomes effective. A decal issued by the commission shall be displayed in any vehicle for which a permit is issued hereunder as evidence that the annual fee has been paid in lieu of the fuel tax. This decal shall be displayed in a conspicuous place.

SECTION 11. That Section 63-2425, Idaho Code, be, and the same is hereby amended to read as follows:

63-2425. DYED FUEL AND OTHER UNTAXED FUEL PROHIBITED FOR USE ON A HIGHWAY.

(1) Except as provided in subsection (2) of this section, no person shall operate a motor vehicle on a highway in this state if the fuel supply tanks of the vehicle contain diesel fuel which has been dyed or marked under the provisions of 26 U.S.C. 4082 and regulations adopted thereunder, or under the clean air act and regulations adopted thereunder, or contain other **motor** fuel on which the tax under section 63-24~~16~~**02**, Idaho Code, has not been paid.

(2) The following vehicles may use dyed fuel on the highway but are subject to the tax under section 63-24~~16~~**02**, Idaho Code, unless exempt under other provisions of this chapter:

(a) State and local government vehicles;

(b) Any vehicles which may use dyed fuel on the highway under the provisions of 26 U.S.C. 4082 or regulations adopted thereunder.

SECTION 12. That Section 63-2443, Idaho Code, be, and the same is hereby amended to read as follows:

63-2443. VIOLATIONS AND PENALTIES.

(a) Acts forbidden: It shall be unlawful for any person to:

(1) Refuse, or knowingly and intentionally fail to make and file any statement required by this chapter in the manner or within the time required;

(2) Wilfully fail to pay any tax due or any fee required by this chapter or any related penalties or interest;

(3) Knowingly and with intent to evade or to aid in the evasion of the tax imposed by this chapter to make any

false statement or conceal any material fact in any record, return, or affidavit provided for in this chapter;

(4) Conduct any activities requiring a license under this chapter without a license or after a license has been surrendered, canceled, or revoked;

(5) Fail to keep and maintain the books and records required by this chapter;

(6) Use dyed or untaxed fuel in a manner prohibited in this chapter.

(b) **It shall be unlawful for any retail dealer in motor fuel who is not a licensed distributor or for any person in the state of Idaho other than a licensed distributor to purchase, receive or accept any motor fuel upon which tax imposed by this chapter has not been paid.**

(c) It shall be unlawful for any person, including a licensed distributor, to sell or transfer any fuel upon which tax required by this chapter has not been paid to any person unless such sale or transfer is authorized by this chapter.

(d) Penalties and remedies: Any person violating any provision of this section is guilty of a misdemeanor, unless the act is by any other law of this state declared to be a felony, and upon conviction is punishable by a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000).

(e**e**) Penalties are cumulative: The fine and imprisonment provided for in this section shall be in addition to any other penalty imposed by any other provision of this chapter.

SECTION 13. SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

SECTION 14. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to July 1, 1996.

Statement of Purpose/Fiscal Impact
STATEMENT OF PURPOSE
RS 12211

This bill establishes laws for the application of motor fuels taxes on Idaho's Indian reservations. It is designed to change the holding of the Idaho Supreme Court in the case of Goodman Oil Company of Lewiston, et al v. Idaho State Tax Commission, by expressly imposing the legal incidence of motor fuels taxes upon the motor fuel distributor who first receives the fuel in Idaho.

Section 1 is a statement of legislative intent. Section 2 imposes both the tax on gasoline and the tax on special fuel directly on the distributor. Sections 3 through 12 make several required conforming changes. Section 13 provides a retroactive effective date of July 1, 1996. Section 14 is a severability clause.

FISCAL IMPACT

This bill is intended to stop the annual estimated revenue loss of $1.6 million motor fuel tax revenue resulting from

the Goodman Oil decision. Without this bill, this loss is expected to grow.

Contact
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(5)

No. 04-624

IN THE

Supreme Court of the United States

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO; NEZ PERCE TRIBE; SHOSHONE-BANNOCK TRIBES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION OF RESPONDENTS COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE, SHOSHONE-BANNOCK TRIBES TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the Idaho Supreme Court had previously held that the legal incidence of the state motor fuels tax is on the retailer and therefore does not apply to tribal retailers on Indian reservations, and the tax was subsequently amended, is the incidence of the amended tax determined by the State legislature's mere statement that it intended to change the legal incidence of the tax, or by the substantive provisions of the amended tax, which were not materially changed from those relied upon by the Idaho Supreme Court and still require the distributor to pass on and collect the tax from the tribal retailer?

2. Whether Congress, by enacting the Hayden-Cartwright Act without mentioning Indians, Indian tribes or Indian reservations, abrogated Indian immunity from state taxation in unmistakably clear terms.

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IN THE

Supreme Court of the United States

No. 04-624

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO; NEZ PERCE TRIBE; SHOSHONE-BANNOCK TRIBES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION OF RESPONDENTS COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE, SHOSHONE-BANNOCK TRIBES TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The petition for a writ of certiorari should be denied because it does not present any conflict among the lower courts or any other question worthy of review by this Court. Both questions presented concern the application of this Court's *per se* rule barring state taxation of Indian tribes and their members on Indian reservations unless Congress' intent

to abrogate that immunity is unmistakably clear. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). Whether the *per se* rule applies turns on the legal incidence of the state tax. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). The petition provides no valid reason why the court of appeals' application of the *per se* rule should be reviewed by this Court.

Applying this Court's decision in *Chickasaw Nation*, the court of appeals properly held that the substantive provisions of the state motor fuels tax, not the legislature's mere say-so, control the ultimate federal question of where the legal incidence falls. The court reasoned that petitioners' assertion that the legislature's incantation is conclusive would give the states complete control over the taxation of Indian tribes and their members in Indian country, in direct conflict with this Court's decisions barring state taxation of Indians absent clear Congressional authorization. In so holding, the court emphasized the unique circumstances in which the question arose, namely the Idaho Supreme Court had held in *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002), that the legal incidence of the tax was on the retailer, and although the State legislature had then amended the tax to state its intent to impose the legal incidence on the distributor, the amendments had not substantively altered the provisions on which the legal incidence ruling in *Goodman Oil* was based. As the court of appeals held, the amended tax still requires the distributor to pass on and collect the tax from the retailer, and in this and other key respects continues to mirror the Oklahoma statutes at issue in *Chickasaw Nation*, thus placing the legal incidence of the tax on the retailer. Pet. App. 17-22. While petitioners urge that the South Dakota Supreme Court's ruling in *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395 (S.D. 2003), *cert. denied*, 124 S. Ct. 2400 (2004), *vacated, in part, on other grounds by* 674 N.W.2d 314 (S.D. 2004), conflicts with the court of

appeals decision in this case, *Pourier* simply holds that the legal incidence of a tax which the retailer passes through to the consumer is on the consumer. No such question is presented here. The court of appeals ruling is consistent with *Chickasaw Nation*, does not present any split of authority, and does not warrant review by this Court.

Applying the rule set out by this Court that state taxation of Indian tribes and tribal members in Indian country is barred unless Congress has abrogated that immunity in unmistakably clear terms, the court of appeals properly held that the Hayden-Cartwright Act, ch. 582, 49 Stat. 1519 (1936) (codified as amended at 4 U.S.C. § 104), does not abrogate Indian immunity from state taxation. That ruling is consistent with the decision of every federal and state court to consider the issue and does not warrant review.[1] As these decisions establish, because the Hayden-Cartwright Act does not refer to "Indians" or "Indian tribes," who hold the immunity petitioners contend was abrogated by the Act, or to "Indian reservations," which are legally distinct from the federal enclaves included within the term "United States military or other reservations," it is not unmistakably clear that Congress intended to abrogate Indian immunity from state taxation in enacting the Act.

STATEMENT OF THE CASE

A. Factual Background

Respondents Coeur d'Alene Tribe, Nez Perce Tribe and Shoshone-Bannock Tribes (collectively "Tribes") are feder-

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[1] This Court previously denied the Idaho State Tax Commission's petition for a writ of certiorari with respect to this same issue in *Goodman Oil*, 534 U.S. 1129 (2002). The State of Idaho was also among the states appearing as *amici* in support of the petition for a writ of certiorari in *Pourier*, *see* Br. for Idaho, et al. as *Amici Curiae* (May 10, 2004), which presented the same Hayden-Cartwright Act issue decided in this case, and in which review was also denied. 124 S. Ct. 2400 (2004).

ally recognized Indian tribes residing on Indian reservations in Idaho, on which they own and operate retail gasoline stations. Pet. App. 4. For several years prior to the Idaho Supreme Court's decision in *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996 (Idaho 2001), *cert. denied,* 534 U.S. 1129 (2002), the State had imposed a tax of 25 cents per gallon on all motor fuel delivered to tribal retailers. Pet. App. 4. Pursuant to Idaho statute, the fuel distributor collected the tax from the tribal retailers and remitted it to the State. *Id.*[2] In *Goodman Oil*, the Idaho Supreme Court declared the State's taxation on Indian reservations to be unlawful. Pet. App. 5. After the decision in *Goodman Oil*, each Tribe enacted its own fuel tax for use in improving and maintaining roads on its own Reservation. Pet. App. 6.[3]

In *Goodman Oil*, the Idaho Supreme Court first held that the Hayden-Cartwright Act does not authorize state taxation of motor fuel sales on Indian reservations because neither the text nor the legislative history of the Act makes it "unmistakably clear" that Congress intended to authorize such taxation. *Goodman Oil*, 28 P.3d at 998-1002. Interpreting the Idaho fuel tax statutes, the court then held that while the tax was imposed on all gasoline when received by the distributor, *id.* at 1002, the legal incidence of the tax fell on the tribal retailer. *Id.* at 1002-04. In so holding, the court found controlling the substantial

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[2] In 1994, the Coeur d'Alene Tribe and the Idaho State Tax Commission entered into an agreement pursuant to which the Tribe collected and remitted the state fuel tax on retail sales of gasoline to non-Indians. *Goodman Oil*, 28 P.3d at 997. These payments were made from that time until *Goodman Oil* was decided. *Id.*

[3] The Coeur d'Alene Tribe imposes a tax of 25 cents per gallon, Pet. App. 49 n.2, as do the Shoshone-Bannock Tribes. CR 64 ¶ 9 (No. CV-02-185-S-BLW). The Nez Perce Tribe imposes a tax of 15 cents per gallon. Pet. App. 49 n.2. Each Tribe has its own substantial road maintenance needs. CR 7 ¶ 2 (No. CV-02-185-S-BLW) (Coeur d'Alene Tribe); CR 6 ¶ 6 (No. CV-02-203-C-BLW) (Nez Perce Tribe); CR 64 ¶¶ 10, 11 (No. CV-02-185-S-BLW) (Shoshone-Bannock Tribes).

similarities between the Idaho tax and the Oklahoma tax invalidated in *Chickasaw Nation*, including (1) the requirement that the distributor pass on and collect the tax from the retailer, and then remit it to the State, (2) the tax credit provided to the distributor for collecting and remitting the tax on behalf of the State, (3) the ability of the distributor to deduct tax payments it was unable to collect from the retailer, and (4) the absence of any provision setting off the retailer's liability where consumers fail to pay. *Id.* at 1003. As the court concluded, where "'[t]he import of the language and the structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel; the motor fuel taxes are *legally imposed on the retailer* rather than on the distributor or the consumer.'" *Goodman Oil*, 28 P.3d at 1003 (quoting *Chickasaw Nation*, 515 U.S. at 462).

Idaho then petitioned this Court for a writ of certiorari to review the ruling in *Goodman Oil* only with respect to the Hayden-Cartwright Act issue. *Idaho State Tax Comm'n v. Goodman Oil Co.*, No. 01-794. Idaho's petition was denied on February 19, 2002. 534 U.S. 1129.

On March 23, 2002, the Idaho legislature amended the motor fuels tax in an effort to shift the legal incidence of the tax to the distributor. 2002 Idaho Sess. Laws ch. 174 ("Ch. 174") (Pet. App. 49). The Statement of Purpose attached to the bill that enacted Ch. 174 declared "[t]his bill establishes laws for the application of motor fuels taxes on Idaho's Indian reservations." Pet. App. 151. The legislature also explicitly stated in the law's uncodified Statement of Intent that:

> The Legislature intends by this act to modify the holding of the Idaho Supreme Court in the case of *Goodman Oil* . . . . Specifically, the Legislature intends, by this act, to expressly impose the legal incidence of motor fuels taxes upon the motor fuel distributor who receives (as "receipt" is defined in Section 63-2403, Idaho Code) the fuel in [Idaho] . . . .

Ch. 174, § 1 (Pet. App. 133). The statutory definition of "receipt" referred to in § 1, set forth in Idaho Code § 63-2403, was not substantively amended. Pet. App. 140-41. While § 2 of Ch. 174 amended Idaho Code § 63-2402(1) to impose the tax "upon the receipt of motor fuel in this state by any distributor," Pet. App. 133, the *Goodman Oil* court had already construed the tax to be imposed on all gasoline when received by the distributor. 28 P.3d at 1002. Chapter 174 did not substantively amend the other provisions on which the *Goodman Oil* ruling was based. Pet. App. 15-16.

Chapter 174 was enacted by the State as emergency legislation, and was declared to be "in full force and effect on and after its passage and approval, and retroactively to July 1, 1996." Ch. 174, § 14 (Pet. App. 151).

B. District Court Proceedings

The instant litigation, begun by the action filed by the Coeur d'Alene Tribe on April 21, 2002, CR 1 (No. CV-02-185-S-BLW), was consolidated with actions later filed by the Nez Perce Tribe, CR 1 (No. CV-02-203-C-BLW), and the Shoshone-Bannock Tribes, CR 1 (No. CV-02-226-S-BLW). *See* CR 23 (No. CV-02-203-C-BLW) (first consolidation order); CR 56 (No. CV-02-226-S-BLW) (second consolidation order). Each action named the State Tax Commissioners in their official capacities as defendants and alleged, *inter alia*, that the legal incidence of the state motor fuels tax remained on the retailer after Ch. 174 was enacted, and federal law therefore barred its imposition on tribal retailers on Indian reservations.

On cross-motions for summary judgment, the district court addressed two issues: (1) whether the Hayden-Cartwright Act authorized application of the state tax to fuel sold to Indians and the Tribes on their Reservations, and (2) whether the legal incidence of the tax, as amended by Ch. 174, fell on the retailer or the distributor. Pet. App. 47-59. The court first

ruled, as the Idaho Supreme Court had a year earlier, that the Hayden-Cartwright Act did not expressly authorize state taxation of fuel sales on Indian reservations. *Id.* at 52-55. The court held that the use of the word "reservation" in the Act did not establish that Congress intended to grant states authority to tax Indians inside Indian country because Indian reservations are distinct from the types of reservations referred to in the Act. *Id.* at 54-55. While Congress had given up the federal government's exemption from state taxation to a limited extent in the Act, the court held that this did not mean that the federal government had given up the Indians' exemption from state taxation on Indian reservations. *Id.* at 55.

The court then determined that Ch. 174 did not change the legal incidence of the tax. While the new statute declared that the legal incidence fell on the distributor, the key provisions of the tax remained unchanged. "[E]ven while declaring the distributor legally obligated to pay the tax, the legislature imposed no real burden on the distributor. Instead, the statute retains the 'pass through' quality of the prior statute. No difference exists between the old statute and the new one." *Id.* at 58. Regarding the State's argument that the legislature's declaration was conclusive, the court held that a state could not be permitted to avoid a constitutional prohibition on taxing tribes by a "mere incantation" that the legal incidence fell on the distributor, with no change in the substance of the tax at all. *Id.*

C. Court of Appeals Ruling

The Ninth Circuit affirmed, holding that as a matter of federal law, the legal incidence of the tax remains on the tribal retailer and that the Hayden-Cartwright Act does not provide the express Congressional authorization necessary for the State to impose its motor fuels tax on Indian tribes.

Addressing the State's contention that the legislature's incantation on legal incidence conclusively resolved the issue, the court of appeals held that while the legislature's designation was dispositive of its intent, the "incidence of a state tax on a sovereign Indian nation inescapably is a question of federal law that cannot be conclusively resolved in and of itself by a state legislature's mere statement." Pet. App. 11. As the court held, if state legislatures were permitted to do so, it would wholly undermine this Court's precedent prohibiting state taxation of Indians absent clear Congressional authorization, *id.* at 12, and allow states to tax Indian tribes simply by declaring that "the incidence of the tax lies elsewhere, [which] would permit the states indirectly to threaten the very existence of the Tribes," *id.* at 14. As the amended tax was substantively indistinguishable from the prior tax law, which the Idaho Supreme Court had already held imposed the legal incidence on the retailer, *id.* at 15-20, and continued to require the distributor to pass on and collect the tax from the retailer and then remit it to the State, *id.* at 17-22, the court held that the legal incidence remained on the retailer. *Id.* at 22.

The court of appeals then held that the Hayden-Cartwright Act does not provide the "unmistakably clear" Congressional intent necessary to abrogate the tribes' immunity from state taxation under this Court's decision in *Blackfeet Tribe*, 471 U.S. at 765. As the court noted, "[t]he Eighth Circuit, every federal district court, and every state court to address the issue thus far has held that clear congressional authorization under the Hayden-Cartwright Act is not present." Pet. App. 28. The court rejected the State's argument that the unmistakably clear standard does not apply to a statute of general applicability, determining that "this argument misses the preliminary point of statutory interpretation," namely whether the Act gives a general command permitting state taxation of motor fuel sales on reservations. *Id.* at 31. The court declined to construe the Act's waiver of federal tax immunity as

an implied waiver of tribal tax immunity, especially where no mention was made in the text or legislative history of the abrogation of the tribes' immunity. *Id.* at 37. It determined that to interpret the Act as authorizing state taxation of on-reservation sales to tribally-owned retailers would require two unsupported assumptions: that Congress meant to include Indian reservations in the terms of the Act without specifically so stating, and that Congress intended to abrogate the immunity of Indian tribes without saying so. *Id.* In view of the ambiguous terms and legislative history, the court held that the Act did not provide the unmistakably clear intent necessary to achieve this abrogation. *Id.*

Judge Kleinfeld filed a dissenting opinion addressing only the Hayden-Cartwright Act issue. His opinion invoked the same "unmistakably clear" standard, but interpreted the Act as providing the requisite level of clarity.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW, HOLDING THAT THE LEGISLATURE'S MERE SAY-SO IS NOT CONCLUSIVE OF THE LEGAL INCIDENCE OF THE AMENDED STATE FUEL TAX WHERE THE TAX STILL REQUIRES THE DISTRIBUTOR TO PASS ON AND COLLECT THE TAX FROM THE TRIBAL RETAILER, IS CONSISTENT WITH *CHICKASAW NATION*

A. The Court of Appeals Properly Applied the Principles of *Chickasaw Nation* in Rejecting the Contention that the Legislature's Mere Statement of Intent Is Conclusive of Legal Incidence

Petitioners' contention that the State legislature's explicit intent to place the legal incidence of the state fuel tax on the distributor is conclusive of the question does not warrant review by this Court. Petitioners do not cite any case that has

ever so held, much less establish a split of authority on the question. Instead, petitioners' argument is based exclusively on this Court's statement in *Chickasaw Nation* of what was *not* before the Court, namely the statutes there at issue did not "expressly identify who bears the tax's legal incidence," or "contain a 'pass through' provision, requiring distributors and retailers to pass the tax's cost to consumers" and that "[i]n the absence of such dispositive language, the question is one of fair interpretation of the taxing statute as written and applied." 515 U.S. at 461 (internal quotations omitted). In arguing that the legislature's mere say-so is conclusive of legal incidence, petitioners contend that in *Chickasaw Nation*, this Court authorized states to tax Indians and Indian tribes in Indian country as long as the legislature declares that the legal incidence is elsewhere, and that if such a declaration is made it makes no difference how the tax statute is written and applied. *Chickasaw Nation* did not so hold and may not be so construed. To the contrary, in *Chickasaw Nation* this Court "adhere[d] to settled law" in holding that if the legal incidence of a state tax rests on a tribe or its members in Indian country, it is invalid absent clear Congressional authorization. *Id.* at 453, 458-59.

While acknowledging that the "Supreme Court in *Chickasaw Nation* was not facing the case of an explicit legislative designation," Pet. App. 11, the court of appeals gave careful consideration to the language in *Chickasaw Nation* on which petitioners rely. Based on this analysis, the court held "the Supreme Court's use of the term 'dispositive' in context appears to us to relate to the legislature's *intent* about where the incidence of the tax lies, and not to the ultimate federal question of where the tax's legal incidence lies." Pet. App. 12. This holding fully comports with this Court's decision in *Chickasaw Nation* and the settled law on which it is based.

The court of appeals began by recognizing that "if the state tax's incidence falls on the Indians, it is unlawful absent a

'clear congressional authorization' to the contrary," Pet. App. 8-9 (quoting *Chickasaw Nation*, 515 U.S. at 459), and that the determination of legal incidence is a question of federal law, *id.* at 9 (citing *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954)).

The court held that because the legal incidence of a state tax is a question of federal law, it "cannot be conclusively resolved in and of itself by the state legislature's mere statement." Pet. App. 11. As this Court held in *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930), in rejecting a state's claim that its tax was imposed on oil and gas severed from the realty, rather than on an Indian allottee's legal interest in allotted lands: "[w]here a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted."[4] Were the law otherwise, the state

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[4] More broadly, this Court has consistently made its own determination of whether a state tax is barred by the Indian immunity from state taxation, rather than deferring to the state's construction of the tax. *See, e.g.*, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (rejecting state's contention that because state law made a state excise tax on sales of fee land a lien upon the property sold, the tax fell within the Burke Act's authorization of the "taxation of land" because "otherwise all sorts of state taxation of reservation-Indian activities could be validated (even the cigarette sales tax disallowed in *Moe* [*v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976)]) by merely making the unpaid tax assessable against the taxpayer's fee-patented mineral estate"); *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 126-28 (1993) (rejecting state's assertion that state vehicle excise tax should be treated as a sales tax on transactions occurring outside Indian country, and holding that state tax was a personal property tax preempted by the holdings in *Moe* and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980)); *Colville*, 447 U.S. at 162-63 (state cannot avoid Indian exemption from state personal property tax recognized in *Moe* by labeling its tax an excise tax).

could name one party the taxpayer, while requiring another to pay the tax, and in the process defeat the second party's tax immunity, which the court of appeals found would directly conflict with this Court's decision in *Kern-Limerick*. Pet. App. 14.[5] That decision "squarely rejected the idea that 'a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign' because '[s]uch a conclusion . . . would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.'" Pet. App. 13-14 (quoting *Kern-Limerick*, 347 U.S. at 121).

Assessing the conflict between this Court's precedent and petitioners' contention, the court of appeals held "[i]f the legislature could indirectly tax Indian nations merely by reciting *ipso facto* that the legal incidence of the tax was on another party, it would wholly undermine the Supreme Court's precedent that taxing Indians is impermissible absent clear *congressional* authorization." Pet. App. 12 (citing *Blackfeet Tribe*, 471 U.S. at 765). That conclusion is well supported. "In the special area of state taxation of Indian tribes and tribal members, [this Court has] adopted a *per se* rule," under which the Court "'will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.'" *California v.*

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[5] The court properly rejected petitioners' contention that legal incidence is determined by who the State intends the taxpayer to be. Pet. App. 11 n.4. While petitioners urge that position here, Pet. 19 (citing *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347-48 (1968)), this Court has made clear that "the test formulated by [*First Agric.*]" for determining legal incidence is that "where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 608 (1975).

Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987) (quoting *Blackfeet Tribe*, 471 U.S. at 765); *see also Yakima*, 502 U.S. at 258.[6] That rule is rooted in the Constitution and the retained sovereignty of Indian tribes:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), citing *Worcester v. Georgia*, 6 Pet. 515, 561 (1832). As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

Blackfeet Tribe, 471 U.S. at 764.[7] The *per se* rule protects the exclusive constitutional authority of the United States in Indian affairs by "accord[ing] due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members." *Chickasaw Nation*, 515 U.S. at 459 (citing *Yakima*, 502 U.S. at 267). Petitioners' contention

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[6] In contrast, the petition for a writ of certiorari in *Richards v. Prairie Band Potawatomi Nation*, No. 04-631, concerns the balancing test, which is applied to determine whether federal law preempts state taxation of non-Indians. *See Colville*, 447 U.S. at 154-64. In this area, "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy." *Chickasaw Nation*, 515 U.S. at 459 (citing *Colville*, 447 U.S. at 154-57). While the Brief *Amicus Curiae* of the Multistate Tax Commission in *Prairie Band*, at 10-11, seeks to link that case to the instant one, this Court's decisions establish that the Indian immunity from state taxation is governed by principles that are categorically distinct from the rules which apply to state taxation of non-Indians, as discussed in the text above. Thus, the link suggested by *Amicus Curiae* in *Prairie Band* is plainly not legally significant.

[7] This Court has applied these principles since 1867, *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), and "has never wavered from the views expressed in these cases." *Blackfeet Tribe*, 471 U.S. at 765.

seeks to place states in the position that the Constitution has reserved for Congress, in direct conflict with the decisions of this Court.[8]

The court of appeals further found that "[i]f state legislatures could tax Indian tribes merely on the assertion that the incidence of the tax lies elsewhere, it would permit states indirectly to threaten the very existence of the Tribes" because "the unchecked power to tax is the power to destroy." Pet. App. 14 (citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)). The *per se* rule, which is "'rooted in the unique trust relationship between the United States and the Indians,'" *Blackfeet Tribe*, 471 U.S. at 766 (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)), is informed by this same concern. As this Court stated in *Yakima*, "[i]n the area of state taxation, . . . Chief Justice Marshall's observation that 'the power to tax involves the power to destroy,' counsels in favor of the categorical approach." 502 U.S. at 258 (citation omitted).

In rejecting petitioners' contention that the State legislature's designation of legal incidence is conclusive of the issue, the court emphasized that its conclusion was reinforced by the unique circumstances in which the issue arose. Pet. App. 15-16. Specifically, before the Idaho legislature enacted Ch. 174, the Idaho Supreme Court had determined in *Goodman Oil* that the retailer bore the legal incidence of the motor fuels tax. That holding, the court of appeals found, was "entitled to weight on how we assess the legal incidence of the tax from its operation." *Id.* at 15 (citing *Am. Oil Co. v.*

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[8] Applying the *per se* rule, this Court has held that states may not tax Indian tribes and Indians in Indian country with respect to their income, *Okla. Tax Comm'n*, 508 U.S. at 126; *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973), personal property, *Colville*, 447 U.S. at 163-64; *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe*, 425 U.S. at 480-81, or on-reservation sales and purchases, *Yakima*, 502 U.S. at 258; *Colville*, 447 U.S. at 160; *Moe*, 425 U.S. at 475-81.

Neill, 380 U.S. 451, 455-56 (1965)). Acknowledging that *Goodman Oil* had construed the tax before Ch. 174 was enacted, the court found that the operative provisions of the tax on which *Goodman Oil* was based "remained in substance unchanged by the state legislative efforts to circumvent *Goodman Oil*." Pet. App. 15. While the State relied heavily on § 2 of Ch. 174, which amended Idaho Code § 63-2402(1) to provide that the tax is imposed "upon the receipt of motor fuel," the court held that this change had not substantively altered the state fuel tax. Pet. App. 16 n.8. As the court explained, before Ch. 174 was enacted, the unamended tax had been "imposed on all gasoline received" by the distributor, as shown by Idaho Code § 63-2405, and "the *Goodman Oil* court had already interpreted the unamended statute as imposing a tax when the gasoline was received by the fuel distributor." *Id.* (emphasis omitted). In these circumstances, the court of appeals correctly held that it should not automatically defer to the Idaho legislature's statement of intent on legal incidence. *Id.* at 16. That holding does not present any split of authority and does not warrant review by this Court.

B. The Court of Appeals Ruling on Legal Incidence Is Fully Consistent with *Chickasaw Nation*

On legal incidence, petitioners seek review of only the question whether the State legislature's designation of legal incidence is conclusive. However, the soundness of the court of appeals' determination of legal incidence provides an additional reason for rejecting petitioners' position.[9] As the

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[9] Petitioners also contend that the rule for which they argue was the "*quid pro quo*" which the *amici curiae* states urged upon the Court in *Chickasaw Nation* for their rejection of the Oklahoma Tax Commission's position in that case, Pet. 16, but this assertion reveals only the lack of support for their argument in the law.

court held, when a party simply collects taxes for transmittal to the state, the collecting party does not bear the legal incidence of the tax. Pet. App. 9 (citing *Chickasaw Nation*, 515 U.S. at 461-62). Rather, where "'[t]he import of the language and the structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel'; the 'motor fuel taxes are legally imposed on the retailer rather than on the distributor or the consumer.'" *Chickasaw Nation*, 515 U.S. at 462 (quoting *Chickasaw Nation v. Oklahoma, ex. rel. Okla. Tax Comm'n*, 31 F.3d 964, 971-72 (10th Cir. 1994)).

The court of appeals began by emphasizing that "[c]ritical to our analysis is our conclusion that the relevant operative provisions of the fuel tax that the state supreme court analyzed have not changed." Pet. App. 17. The court of appeals first determined that Idaho law "still requires the non-tribal distributor who receives the motor fuel and sells it to the Indian tribes to pass on and to collect the tax from the retailer, and then to remit the taxes to the State." *Id.* at 17 and n.9.[10] In these respects, the court held, the Idaho motor fuels tax was similar to the state tax statutes at issue in *Chickasaw Nation*, which were held to impose the legal incidence of the tax on

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[10] As the court of appeals further held, the express language of Idaho Code § 63-2435 "declares that state fuel taxes are included in every taxable sale of gasoline made by a distributor and that upon receipt of payment by the distributor, an amount equal to the tax is money due the state, which the distributor holds in trust for payment to the state." *Id.* at 17. Under this provision, the court explained "the source of the funds the distributor collects—which are placed in trust for the state—is the tax that is assessed on and collected from the *retailers*. That is, the distributor never receives title to the state's share of the retailer's funds." *Id.* at 18 n.11. As the court further found, state regulations also expressly require that "all invoices for sales by distributors to retailers must show that the state fuel tax was charged to the retailer." *Id.* at 18 (citing Idaho Admin. Code § 35.01.05.150.g).

the retailer. *Id.* at 18.[11] Second, the court of appeals found that State law "provides tax credits to the distributor for 'collecting and remitting' the tax on behalf of the State." Pet. App. 19 (quoting Idaho Code § 63-2407(4)). Here too, the court of appeals found that the Idaho tax was like the statutory scheme at issue in *Chickasaw Nation*. *Id.* Third, the court held that the Idaho statutes provided "tax credits to the distributor for fuel taxes that the distributor has paid but cannot then collect from the retailer," which again "square[d] with *Chickasaw Nation*." *Id.* at 20. Fourth, the court held that "Idaho law provides that the retailer has the right to any refund of fuel taxes sought by the distributor that the retailer has paid." *Id.* at 21. In contrast, the court of appeals pointed out, retailers are neither offered a tax credit when consumers fail to pay the tax, nor are they offered a tax credit for collecting and remitting the tax. *Id.* Furthermore, the tax must be paid whether or not the Indian retailer sells the fuel to consumers. *Id.* As the court stated, "it is plain that the tax buck stops with the Indian tribal retailers." *Id.*

While petitioners did not rely on the decision in *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395, 399 (S.D. 2003), *cert. denied*, 124 S. Ct. 2400 (2004), *vacated, in part, on other grounds by* 674 N.W.2d 314 (S.D. 2004), to support their position on legal incidence before the court of appeals,[12] they now contend that the court of appeals decision conflicts with *Pourier* on that very issue. This contention has no merit.

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[11] Petitioners simply ignore this analysis and the explicit statutory requirements quoted by the court of appeals, asserting that "the court of appeals did not identify, or even suggest the existence of, an explicit pass-through requirement." Pet. 20 (emphasis omitted). This contention is simply incorrect.

[12] Petitioners did, however, seek to distinguish the *Pourier* court's holding on the application of the Hayden-Cartwright Act. Reply Br. of Appellants in Nos. 02-35965, 02-35998 and 02-36020, at 14 and n.3 (9th Cir. July 8, 2003).

In *Pourier,* the South Dakota Supreme Court held that the legal incidence of the South Dakota fuel tax was on the consumer because the tax was passed through to the consumer.[13] That holding presents no conflict with the court of appeals' holding in this case that the legal incidence of a state tax which the distributor is required to pass on and collect from the retailer is on the tribal retailer.[14] Furthermore, *Pourier* did not pose the question whether a state may tax Indian tribes "merely on the assertion that the incidence of the tax lies elsewhere," as was the case here. Pet. App. 14. Indeed, the state conceded in *Pourier* that the legal incidence of the tax fell on the tribe or its members. 658 N.W.2d at 403 n.4. *Pourier* thus does not conflict with the court of appeals decision in this case.

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[13] That holding was based on the state trial court's finding that the retailer passed the tax through to the consumer, *Pourier*, 658 N.W.2d at 398, as well as the state tax statute, and this Court's statement in *Chickasaw Nation* that the state could "'declar[e] the tax to fall on the consumer and direct[] the Tribe to collect and remit the levy.'" *Id.* at 405 (quoting *Chickasaw Nation*, 515 U.S. at 460). That statement simply recognizes that an express pass-through provision is not required to place the legal incidence of a state tax on the consumer. *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985) (per curiam).

[14] That ruling is also consistent with *Chickasaw Nation*.

II. THE DECISION BELOW CORRECTLY HELD, CONSISTENT WITH EVERY FEDERAL AND STATE COURT TO CONSIDER THE ISSUE, THAT THE HAYDEN-CARTWRIGHT ACT DOES NOT SHOW THAT CONGRESS INTENDED TO ABROGATE INDIAN IMMUNITY FROM STATE TAXATION IN UNMISTAKABLY CLEAR TERMS

A. As the Court of Appeals Held, This Court's Rulings Make Clear that Indian Immunity from State Taxation Is Abrogated Only if Congress' Intent to Do So Is Unmistakably Clear

Petitioners seek review of the court of appeals ruling that the Hayden-Cartwright Act does not abrogate the tribes' immunity from state taxation, but do not allege any split of authority on the question presented. Nor could they. As the court of appeals held, "[t]he Eighth Circuit, every federal district court, and every state court to address the issue thus far has held that clear congressional authorization under the Hayden-Cartwright Act is not present, rejecting states' attempts to tax Indians for motor fuel delivered and sold on their own reservations." Pet. App. 28 (citing *Marty Indian Sch. Bd. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987); *Winnebago Tribe of Neb. v. Kline*, 297 F. Supp. 2d 1291, 1304 (D. Kan. 2004); *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1307 (D. Kan. 2003);[15]

[15] *Prairie Band* is now before this Court on the State of Kansas' petition for a writ of certiorari with respect to other issues. *Richards v. Prairie Band Potawatomi Nation*, No. 04-631. The district court's ruling with respect to the Hayden-Cartwright Act was not cross-appealed to the court of appeals by the state, and accordingly was not addressed by the court of appeals in *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir. 2004).

Pourier, 658 N.W.2d at 399; *Goodman Oil*, 28 P.3d at 1001-02)).[16]

The principal basis on which review is sought is petitioners' contention that the court of appeals improperly "invok[ed] the Indian canons of construction" in ruling on the Hayden-Cartwright Act, which petitioners contend is a general act of Congress to which the Indian canons of construction do not apply. Pet. 25; *see also* Pet. 26 and n.10-11. But the only "canon of statutory construction from the Indian context" applied by the court of appeals was the settled rule that "'Indian tribes and individuals generally are exempt from state taxation within their own territory,' unless Congress has 'made its intention to do so unmistakably clear,'" Pet. App. 31 (quoting *Blackfeet Tribe*, 471 U.S. at 764-65).[17] *See Yakima*, 502 U.S. at 258; *Cabazon*, 480 U.S. at 215 n.17; *Blackfeet Tribe*, 471 U.S. at 765; *see also Chickasaw Nation*, 515 U.S. at 459 ("If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional

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[16] As the court of appeals also noted, this Court has twice expressly declined to consider the Hayden-Cartwright Act issue presented by petitioners. Pet. App. 28 n.20 (citing *Chickasaw Nation*, 515 U.S. at 456-57; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980)).

[17] Contrary to petitioners' assertion, this Court has consistently applied the canon which requires that statutes be construed liberally in favor of the Indians, and that ambiguous provisions be interpreted to their benefit, to statutes which are claimed to abrogate Indian tax immunities, without regard to whether the statute is general or specific. *Yakima*, 502 U.S. at 269; *Blackfeet Tribe*, 471 U.S. at 766; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149-52 (1982); *Bryan*, 426 U.S. at 392; *McClanahan*, 411 U.S. at 174; *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Choate v. Trapp*, 224 U.S. 665, 675 (1912). In any event, the court of appeals did not apply this canon.

authorization."). As this Court's decisions show, the court of appeals' application of this standard was clearly proper.[18]

These decisions reject petitioners' novel contention, unsupported by the ruling of any court, that this Court's decision in *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), set forth the standard for determining whether Congress has authorized state taxation of Indian tribes and their members. In *Tuscarora*, this Court held that a licensee under the Federal Power Act was empowered by Section 21 of the Act to condemn land owned in fee by the Tuscarora Indian Nation. While petitioners rely on the statement in *Tuscarora*, that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary," 362 U.S. at 120, this Court has made clear that "[i]n the special area of state taxation of Indian tribes and tribal members," the *per se* rule is controlling, and that rule requires that Congress' intent to abrogate Indian immunity from state taxation be unmistakably clear. *Cabazon*, 480 U.S. at 215 n.17. The court of appeals properly rejected petitioners' contention that *Tuscarora* requires otherwise. Pet. App. 31.[19]

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[18] *See also Pourier*, 658 N.W.2d at 399 (unmistakably clear standard); *Goodman Oil*, 28 P.3d at 1001-02 (unmistakably clear standard); *Prairie Band*, 241 F. Supp. 2d at 1304 (state taxation of Indians barred "[u]nless Congress makes it abundantly clear that it intends to grant taxing authority to the states").

[19] Furthermore, the statement from *Tuscarora* on which petitioners rely did not provide the basis of the decision. As the Court explained:

> [The Federal Power Act] neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians—"tribal lands embraced within Indian reservations." See §§ 3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.

362 U.S. at 118. As the Tuscarora lands there involved were not "reservation" lands as defined by the Act, *id.* at 110-15, nor were they subject to

There is no split of authority with respect to that ruling and review is not warranted here.

B. The Court of Appeals Ruling with Respect to the Hayden-Cartwright Act Is Consistent with the Decision of Every Court to Consider the Issue and Does Not Warrant Review by This Court

Beyond this, petitioners simply restate their position with respect to the Hayden-Cartwright Act, which the court of appeals and every other federal and state court to consider the issue have rejected. In view of the fact that two federal courts of appeals, two state supreme courts and three federal district courts all have held that the Hayden-Cartwright Act does *not* apply to Indian reservations, it cannot be "unmistakably clear" that Congress intended the Act to so apply. Review of the court of appeals decision on this issue is not warranted.

While the Hayden-Cartwright Act "effectively waived the *federal* government's sovereign immunity from state tax collection," Pet. App. 37, this does not establish that Congress intended also to abrogate *tribal* immunity from state taxation. The Act makes no reference to Indian tribes, which are immune from state taxation as an element of their retained sovereignty. *Blackfeet Tribe*, 471 U.S. at 764. It cannot be said to be unmistakably clear that Congress extinguished that immunity without even referring either to its holder or to its existence. Pet. App. 37 (quoting *Bryan*, 426 U.S. at 381) ("'[S]ome mention [of the abrogation of tribal immunity] would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.'"). The district court reached the

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any treaty between the Tuscarora and the United States, *id.* at 123, the Court held that Section 21 of the Federal Power Act applied to these lands. *Id.* at 123-24.

same conclusion. Pet. App. 55 and n.4; *see also Prairie Band*, 241 F. Supp. 2d at 1306; *Pourier*, 658 N.W.2d at 403.

Nor does the Hayden-Cartwright Act refer to "Indian reservations." As the court of appeals held, simply because the term "reservation" could include Indian reservations does not mean that it does so whenever it is used. Pet. App. 32. As this Court made clear in *United States v. Celestine*, 215 U.S. 278, 285 (1909), "a reservation is not necessarily 'Indian country.'"[20] It has long been clear, as the court explained in *Goodman Oil*, that "Indian reservations are different; distinct from every other type of reservation, i.e., national parks, wilderness areas, military reservations, and even further, Indian reservations are a distinct entity within the law." 28 P.3d at 1000; *accord Prairie Band*, 241 F. Supp. 2d at 1303-05; *Pourier*, 658 N.W.2d at 399. That an express reference to Indian reservations is required before a federal statute may be held to authorize state taxation on Indian reservations is clear

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[20] In *Celestine*, this Court interpreted the Act of March 3, 1885, ch. 341, 23 Stat. 362 ("1885 Act"), which made the laws of the United States which apply to crimes committed within the exclusive jurisdiction of the United States applicable to seven listed crimes when committed by Indians on Indian reservations. 215 U.S. at 283-84. The defendant argued that the 1885 Act did not apply to Indian allotments because such lands, though within the Indian reservation on which the crime occurred, were not "Indian country," as that term was then defined by federal law. *Id.* at 283-87. In rejecting this argument, the Court stated that:

> the word 'reservation' has a different meaning, for while the body of land described in the section quoted as 'Indian country' was a reservation, yet a reservation is not necessarily 'Indian country.' The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, *or* an Indian reservation, *or*, indeed, one for any purpose for which Congress has authority to provide.

Id. at 285 (emphasis added). In *Celestine*, the statute made its meaning clear by expressly referring to "any Indian reservation," *id.* at 284, thus recognizing that the term "Indian reservation" has a separate and distinct meaning in the law.

from this Court's decision in *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965). There, this Court held that the Buck Act, ch. 389, 61 Stat. 644 (1947), 4 U.S.C. §§ 105-10, which authorizes states to apply sales and use taxes in "federal area[s]," defined by the Act as "any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States," 4 U.S.C. § 110(e), does not apply to Indian reservations. *Id.* at 691 n.18. This Court has since twice reaffirmed that holding. *Cent. Machinery Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 166 n.5 (1980); *White Mountain Apache*, 448 U.S. at 151 n.16. Accordingly, as the court of appeals held, it is not "unmistakably clear" that Congress, without saying so, intended that the phrase "United States military or other reservations" include Indian reservations. Pet. App. 37; *see also Goodman Oil*, 28 P.3d at 1000; *Prairie Band*, 241 F. Supp. 2d at 1305; *Pourier*, 658 N.W.2d at 399, 401.

Petitioners' contention that, notwithstanding the absence of any reference to Indians, Indian tribes or Indian reservations in the Hayden-Cartwright Act, the inclusion of the term "licensed trader" extends its terms to Indian retailers on Indian reservations, has also been rejected by every court to consider it. As the court of appeals recognized, the term could well refer to non-Indian traders licensed to conduct business on the federal reservations which are subject to the Hayden-Cartwright Act. Pet. App. 33;[21] *accord Goodman Oil*, 28 P.3d at 1000 ("The term 'licensed trader' could refer to licensed distributors or sellers of goods in *all* federal reservations."); *Pourier*, 658 N.W.2d at 401 ("Congress gave no indication in the statute that the term referred to Indian

[21] As the court of appeals further found, even if the term could be so construed, it is not clear "that the tax could be imposed on Indian tribes, as opposed to on non-Indian traders licensed to do business on Indian reservations." Pet. App. 33.

traders as opposed to those non-Indian traders who were required to obtain a license to sell fuel."); *Prairie Band*, 241 F. Supp. 2d at 1304.

Acknowledging that the Hayden-Cartwright Act was passed in response to this Court's decision in *Standard Oil Co. v. California*, 291 U.S. 242 (1934), which invalidated a state tax on a gasoline distributor delivering fuel to a post exchange on a military reserve, petitioners assert that Congress "clearly had no thought of limiting the grant to military reserves." Pet. 24.[22] But what is required is an "unmistakably clear" showing of Congressional intent to abrogate tribal immunity, *Blackfeet Tribe*, 471 U.S. at 765, and as the court of appeals held, nothing in the legislative history of the Act shows that Congress unmistakably intended to extend the Act to Indian reservations. Pet. App. 35-36 (citing *Pourier*, 658 N.W.2d at 402-03).[23] Petitioners' argu-

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[22] While the State refers to the federal instrumentality doctrine, Pet. 24-25, suggesting its relevance to the Hayden-Cartwright Act issue, this Court's decision in *Blackfeet Tribe* makes clear that the Indian immunity from state taxation is instead based on the federal government's exclusive constitutional authority in Indian affairs, and the retained sovereignty of Indian tribes. 471 U.S. at 764. It is also settled that Indian tribes are separate sovereigns, not arms of the United States. *United States v. Wheeler*, 435 U.S. 313, 328 (1978). In contrast, as this Court explained in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the federal instrumentality doctrine was applied to Indian lands to invalidate state taxes imposed on non-Indian lessees of Indian land. *Id.* at 174. The doctrine "has now been 'thoroughly repudiated' by modern case law." *Id.* (quoting *South Carolina v. Baker*, 485 U.S. 505, 520 (1988)).

[23] Petitioners also argue that, by reenacting the Hayden-Cartwright Act, Congress adopted two executive branch opinions interpreting the Act as applying to Indian reservations. This argument was rejected by the court of appeals, which held that "the agency interpretations underscore the ambiguity, not the clarity, of the executive branch's statements insofar as they speak to the applicability of the Act to Indian reservations." Pet. App. 36-37 n.28. Other courts have reached the same conclusion. *See Prairie Band*, 241 F. Supp. 2d at 1306-07; *Goodman Oil*, 28 P.3d at 1001; *Pourier*, 658 N.W.2d at 402; *see also Winnebago Tribe*, 297 F. Supp. 2d

ment that the Act was passed to allow states to build and maintain roads throughout the state fails for the same reason. Indeed, prior to passage of the Hayden-Cartwright Act, Congress had already passed legislation authorizing the "'appropriation of funds for survey, improvement, construction, and maintenance of Indian reservation roads.'" *See* Pet. App. 36 (quoting *Goodman Oil*, 28 P.3d at 1000).[24] Authorizing state taxation of Indian tribes would also have been directly in conflict with the federal Indian policy set forth in the Indian Reorganization Act ("IRA"), ch. 576, 48 Stat. 984, 25 U.S.C. §§ 461-79, which was enacted in 1934. The "overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a

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at 1304. In fact, this Court rejected a nearly identical argument regarding deference to administrative interpretation in *Blackfeet Tribe*. 471 U.S. at 768 n.7.

Petitioners' reliance on *Lorillard v. Pons*, 434 U.S. 575 (1978), is also misplaced. *Lorillard* concerned enforcement of the Age Discrimination Enforcement Act (ADEA), which incorporated sections of the Fair Labor Standards Act (FLSA). The presumption that Congress was aware of existing interpretations was "particularly appropriate [in that case] since, in enacting the ADEA, Congress exhibited . . . a detailed knowledge of the FLSA provisions and their judicial interpretation." 434 U.S. at 581. Such a situation is not present here. Reenactment of a statute cannot be deemed to be legislative approval of an administrative interpretation that is ambiguous and not clearly established by longstanding, consistent regulations or decisions. *Sanford's Estate v. Comm'r of Internal Revenue*, 308 U.S. 39, 49-53 (1939); *see also Sec. and Exch. Comm'n v. Sloan*, 436 U.S. 103, 121 (1978) ("We are extremely hesitant to presume general congressional awareness of the [agency's] construction based only upon a few isolated statements . . . .").

[24] Today, Indian tribes may assume responsibility for administering the Bureau of Indian Affairs Indian Reservation Roads program pursuant to the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450 *et seq.*), and the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (codified as amended at 23 U.S.C. § 204).

greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

The court of appeals ruling with respect to the Hayden-Cartwright Act presents no basis for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The
Supreme Court of the United States

DUWAYNE D HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE; SHOSHONE-BANNOCK TRIBES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents offer little other than the reasoning of the Ninth Circuit majority in opposing certiorari. They contend, for example, that "the court of appeals properly held that the substantive provisions of the state motor fuels tax, not the legislature's mere say-so, control the ultimate federal question of where the legal incidence falls." Opp'n 2. Respondents thus endorse the court's determination to discount the Idaho Legislature's 2002 amendments to the motor fuels tax statute, which removed any doubt over its intent with respect to which economic actor bears legal incidence. They adopt further the majority's description of the amendments as not "substantively alter[ing]" the tax (Opp'n 15) and its reasons for construing the law contrary to the legislature's explicit direction (*id.* 16-17). Respondents see no inconsistency between the Ninth Circuit's application of *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), and that of the South Dakota Supreme Court in *Pourier v. South Dakota*, 658 N.W.2d 395 (S.D. 2003), *vacated in part on other grounds*, 674 N.W.2d 314 (2004), *cert. denied*, 124 S. Ct. 2400 (2004), because the latter court, in their view, merely recognized "that an express pass-through provision is not required to place the legal incidence of a state tax on the consumer." Opp'n 18.

Respondents follow suit with the Ninth Circuit in summarily dismissing petitioners' reliance on *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), for the principle that the Indian canons of construction have no place in determining the geographical reach of section 10 of the Hayden-Cartwright Act, Act of June 16, 1936, ch. 582, 49 Stat. 1519, 1521 (codified as amended at 4 U.S.C. § 104). Opp'n 21. They do take a more restrictive

position than the court of appeals – which considered "the language, structure, and legislative history of the statute" in deeming the term "United State military or other reservations" ambiguous and therefore not an "unmistakably clear" consent to tax (Pet. App. 28) – by arguing that the "unmistakably clear" standard would be satisfied here only if Congress had referred specifically to Indians, Indian tribes, or Indian reservations. Opp'n 3, 24. Finally, they cite other recent Hayden-Cartwright Act litigation as indicative of the lack of unmistakable congressional intent with respect to subjecting tribes or their members to state fuel taxes. Opp'n 22.

Respondents, in short, ask this Court to deny review because the Ninth Circuit reached the right result for the right reasons. In so contending, they fail to address the significant issues identified by petitioners, 16 *amici curiae* States and the *amicus curiae* Multistate Tax Commission ("MTC"). Brief analysis of respondents' basic arguments highlights why certiorari should be granted.

I. RESPONDENTS, LIKE THE COURT OF APPEALS, READ *CHICKASAW NATION* IN A MANNER THAT NOT ONLY RUNS COUNTER TO WHAT THIS COURT STATED BUT ALSO WILL ENCOURAGE JUDICIAL SECOND-GUESSING OF LEGISLATIVE DETERMINATIONS IN A CORE AREA OF STATE AUTHORITY.

This Court in *Chickasaw Nation* found the Tenth Circuit Court of Appeal's ruling on the fuel tax's legal incidence to be "altogether reasonable" and accordingly upheld it. 515 U.S. at 461. Oklahoma had contended there that the incidence was borne by consumers, not retailers, because "the taxes are passed on to the consumer in the

retail price." *Chickasaw Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 31 F.3d 964, 971 (10th Cir. 1994), *aff'd in part and rev'd in part*, 515 U.S. 450 (1995). The court of appeals deemed the state position, which the district court had accepted, as "substitut[ing] economic assumptions for the language of the statute" and observed that "[t]he statutes nowhere require the amount of the tax to be included in the retail price at the pump, a requirement which we could interpret as imposing the tax on the consumer." *Id.* The Tenth Circuit instead placed heavy weight in determining legal incidence on the statute's requirement that the distributor "remit[]" the fuel tax "*on behalf of* a licensed retailer." *Id.* (citing Okla. Stat. Ann. § 505(C)) (emphasis supplied). It is nonetheless plain that, had the Oklahoma law included a mandatory pass-through provision but remained otherwise the same, the court of appeals would have accepted the State's construction.[1]

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[1] The Idaho Supreme Court also emphasized this aspect of the Oklahoma statute in determining that the Idaho statute was "strikingly similar." *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996, 1003 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002). However, the provision of Idaho law relied upon, Idaho Code § 63-2406(4), had been modified by the 2000 Idaho legislature to delete any reference to an obligation on the distributor's part "to collect" the fuels tax. *See* Pet. 5 n.1. Under the provision in effect since July 2000, distributors "required to pay the tax imposed under this chapter" are liable to the tax commission for the unremitted taxes, together with any applicable penalties and interest. Pet. App. 72. The court of appeals, perhaps relying on the Idaho court's analysis, cited to Idaho Code § 63-2406(4) for the notion that the motor fuels statute, even after the 2002 amendments, "still requires the non-tribal distributor who receives the motor fuel and sells it to the Indian tribes to pass on and to collect the tax from the retailer, and then to remit the taxes to the State." Pet. App. 17. Section 63-2406(4), as presently codified, cannot be reconciled with that reading. Also unhelpful to respondents is the other provision relied upon by the

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This Court validated the Tenth Circuit's reasoning by holding that "[i]n the absence of such dispositive language" – *i.e.*, in the absence of an express legislative allocation of legal incidence or a mandatory pass-through provision – the question becomes "one of 'fair interpretation of the taxing statute as written and applied.'" *Chickasaw Nation*, 515 U.S. at 461. Only the lack of certainty regarding the legislature's intent, in other words, mandated the textual analysis. *See* Br. *Amicus Curiae* of States of North Dakota *et al.* 7 (the Oklahoma statute's failure to allocate explicitly legal incidence "opened the door to judicial construction of the statute to identify the taxpayer"). Here, there is no disputing legislative intent and hence neither need nor license to go further. The Idaho Legislature unequivocally spoke to the issue in section 1 of 2002 Idaho Session Laws chapter 174 (56th Leg.), through providing that it "intends, by this act, to expressly impose the legal incidence of motor fuels taxes upon the motor fuel distributor who receives . . . the fuel" and through including a statement of purpose that the act was "designed to change the holding of the Idaho Supreme Court in the case of Goodman Oil Company of Lewiston, et al. v. Idaho State Tax Commission[] by expressly imposing the legal incidence of motor fuel taxes upon the motor fuel distributor who first receives the fuel in Idaho." Pet. App. 133, 151.

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majority for this characterization of the Idaho law – Idaho Code § 63-2435 – which, as *amicus* MTC notes (Br. *Amicus Curiae* of MTC 7 n.9), is merely a security provision ensuring that the portion of a fuel sales equal to the tax due from the distributor for receipt of the fuel sold is held in trust for the State's benefit and does not become "subject to encumbrance, security interest, execution of seizure on account of any debt owed by the distributor . . . to any creditor other than the commission." Pet. App. 95.

Contrary to respondents' assertion (Opp'n 15), moreover, the legislature's specific allocation of legal incidence to distributors was manifested not solely by section 1 and the statement of purpose but also by the amendment to Idaho Code § 63-2402(1). Pet. App. 133. This amendment removed any doubt that the taxable event is the *receipt* of fuel by the distributor, not its sale to the retailer as the Idaho Supreme Court had held in *Goodman Oil*, and that the distributor is the economic actor being taxed by virtue of such receipt. *See Goodman Oil*, 28 P.3d at 1003 (finding the Oklahoma and Idaho taxes similar because, *inter alia*, " 'the tax imposed *when a distributor sells fuel to a reservation* applies whether or not the fuel is ever purchased by a consumer' ") (emphasis supplied). The amendment to Idaho Code § 63-2402(1), when read in conjunction with the coordinating amendment to Idaho Code § 63-2405 (Pet. App. 141), additionally made clear that the tax is being imposed on the distributor's act of receiving motor fuel and is not simply *measured* by the amount of fuel received.

Respondents, like the Ninth Circuit, thus mistake the federal judiciary's authority, under this Court's decisions, to overrule state court construction of state tax statutes when legal incidence allocation and federal rights are at stake with authority to ignore such allocation when the legislature has spoken precisely on the topic. *E.g.*, *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347 (1968) ("[b]ecause the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax"); *American Oil Co. v. Neill*, 380 U.S. 451, 455-56 (1965) ("we give this finding [concerning a tax's operating incidence] great weight in determining the natural effect of a statute, and if it is consistent with the

statute's reasonable interpretation it will be deemed conclusive"); *see* Br. *Amicus Curiae* of MTC 11. This independent review power exists only to protect federal rights from infringement through unreasonable state court interpretation of state law, not to re-write what is being interpreted. *See Bush v. Gore*, 531 U.S. 98, 137 (2000) (Ginsburg, J., dissenting) ("Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court"). Here, the Idaho legislature meticulously complied with federal law, as laid out in *Chickasaw Nation*, and left no ambiguity for judicial construction. Distributors bear legal incidence, and if respondents had a grievance with some specific provision of the motor fuel statute other than the tax imposed on their distributors – and they have never identified any – the appropriate course of action would have been to challenge that provision rather than the tax itself. *See* Pet. 21 n.7.

Last, respondents' argument that the South Dakota Supreme Court's application of *Chickasaw Nation* in *Pourier* does not conflict with the majority's reasoning below cannot be credited. The court there was faced with an explicit legislative allocation of legal incidence to the consumer and considered itself bound by *Chickasaw Nation* to honor that allocation "despite indications in the statute that it may be the marketer who is ultimately responsible to pay the tax" and despite its concern over "the wisdom of permitting a state to determine the entity who bears the legal incidence of a tax by merely making cosmetic changes to a statute." *Pourier*, 658 N.W.2d at 405. Under the Ninth Circuit's approach, however, the South

Dakota court would have been obligated to engage in a "fair interpretation of the taxing statute as written and applied" analysis notwithstanding the legislative determination. The state court correctly recognized its duty under *Chickasaw Nation*; the majority below did not. A palpable conflict exists.

II. RESPONDENTS' CONTENTION THAT THE TERM "RESERVATIONS" IN THE HAYDEN-CARTWRIGHT ACT DOES NOT ENCOMPASS INDIAN RESERVATIONS IN THE ABSENCE OF EXPLICIT REFERENCE TO INDIANS, INDIAN TRIBES, OR INDIAN RESERVATIONS NOT ONLY IS INCOMPATIBLE WITH *TUSCARORA* BUT ALSO IS PREDICATED ON THE ASSUMPTION THAT THE STATE MOTOR FUEL TAX'S LEGAL INCIDENCE ALWAYS WILL BE BORNE BY A TRIBE OR A TRIBAL MEMBER.

Respondents characterize as "novel" petitioners' reliance on *Tuscarora* for the principle that, as a "general Act of Congress," the Hayden-Cartwright Act applies to Indians and their tribes absent a contrary congressional direction. Opp'n 21. It is true that decisions in other litigation addressing the question whether the Act applies to Indian reservations did not discuss *Tuscarora*.[2] Nevertheless,

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[2] Aside from *Goodman Oil* and *Pourier*, those decisions include *Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291 (D. Kan. 2004); *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295 (D. Kan. 2003), *rev'd on other grounds*, 379 F.3d 979 (10th Cir. 2004); and *In re State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737 (S.D. 1978). The court of appeals additionally cited *Marty Indian School Board, Inc. v. South Dakota*, 824 F.2d 684 (8th Cir. 1987), as standing for the proposition that the Hayden-Cartwright Act does not "reach[ ] Indian reservations" (Pet. App. 28), but the Eighth Circuit opinion did

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the relevance of the presumption applied in *Tuscarora* cannot be gainsaid to the extent the Ninth Circuit found the term "United States military or other reservations" ambiguous with respect to its applicability to one of the most obvious examples of a federal reservation. *Tuscarora* itself underscored this point by commenting on Congress' power to define the term "reservation" in an "artificial[]" manner so as to *exclude* Indian reservations. 362 U.S. at 111.

No less off-mark is respondents' contention that, notwithstanding the Hayden-Cartwright Act's status as nationwide legislation applicable to all "United States military or other reservations," the requisite specificity for application to Indian reservations is lacking because, as the Ninth Circuit reasoned, Congress must express its intent to permit state taxation of Indians or their tribes with unmistakable clarity. Opp'n 21. Two difficulties attend their argument. First, implicit in the *Tuscarora* presumption is the requisite congressional authorization; *i.e.*, the general nature of the Hayden-Cartwright Act itself embodies the mandated clarity.[3] Second, and without regard to the preceding point, the immediate issue here is whether the Act applies to motor fuel transactions within

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not consider the issue of whether the Act applies to Indian reservations. *Id.* at 688.

[3] In support of their position, respondents cite to this Court's statement in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), for the principle that "[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule" because "the federal tradition of Indian immunity from state taxation is very strong and . . . the state interest in taxation is correspondingly weak." *Id.* at 215 n.17; *see* Opp'n 21. Nothing in *Cabazon* intimates that canon of construction associated with this categorical rule is repugnant to giving effect to the *Tuscarora* presumption.

Indian *reservations*. *See* Pet. App. 40-41 (Kleinfeld, J., dissenting). Even were the "unmistakably clear" standard eventually found applicable to fuel taxes imposed on resident tribes or their members, it would have no effect as to fuel taxes imposed on nonmembers. The majority below conflated the issue of tribal immunity from state taxation with the issue of whether the Act applies to reservations at all. Pet. App. 27 ("we cannot hold that Congress has authorized state taxation of Indians *or Indian reservations* unless we determine that Congress has 'made its intention to do so unmistakably clear' ") (emphasis added). Needless to say, economic actors are taxed under Idaho and other States' motor fuel laws, not particular locations. The court of appeals thus broke wholly new doctrinal ground in applying the "unmistakably clear" canon to determine what it characterized as "the preliminary point of statutory construction" of determining whether the term "reservations" encompasses Indian reservations. Pet. App. 31. Respondents offer nothing in the way of decisional authority or argument to justify this expansion of the canon.

Finally, respondents' emphasis for certiorari decision-making purposes on the fact that two state supreme courts and two Kansas federal district courts have reached the same conclusion as the Ninth Circuit and the district court below is misplaced. Opp'n 22-23. The *Prairie Band* and *Pourier* opinions' reasoning borrowed heavily from or paralleled closely *Goodman Oil*'s. *E.g.*, *Prairie Band*, 241 F. Supp. 2d at 1304 ("find[ing] the [Idaho] decisions persuasive"); *Pourier*, 658 N.W.2d at 399 ("[t]he language of the statute does not make Congress' intention to allow [motor fuel] taxation 'unmistakably clear' "). The *Winnebago* district court adopted the prior Kansas decision's

conclusion with no substantive discussion. 297 F. Supp. 2d at 1304. These decisions, in sum, do nothing to cure the shortcomings in the Ninth Circuit's analysis or the compelling need for determining whether the Hayden-Cartwright Act applies to Indian reservations.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 04-624

In The
Supreme Court of the United States

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF THE IDAHO STATE TAX COMMISSION,
Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE; SHOSHONE-BANNOCK TRIBES,
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members, eighteen States are associate members and three States are project members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The underlying purpose of the Commission is to preserve to States the sovereignty to fashion their own tax systems. The court of appeals decision be-

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[1] No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its member States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member State. Finally, this brief is filed pursuant to the consent of the parties.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin. Project members are Iowa, Nebraska and Rhode Island.

low used the prism of federal law to distort the plain meaning of the clearly-articulated, carefully-drawn Idaho statute placing the legal incidence of its fuels tax on the receipt of gasoline by distributors. This rejection of Idaho's considered tax policy decision directly conflicts with this Court's teaching in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), and constitutes a dramatic and unwelcome incursion into state tax sovereignty.

In a brief *amicus curiae* filed last month in the companion case of *Richards v. Prairie Band Potawatomi Nation*, No. 04-631, the Commission urged the Court to grant certiorari to preserve important areas of certainty in state taxation impacting Indians, a certainty that bolsters state-tribal harmony.

The territorial aspects of the three concentric sovereigns—tribal, state and federal—have informed this Court's current jurisprudence. The most difficult circumstance arises when all three sovereigns are involved, when a State seeks to tax a non-Indian for a transaction with an Indian on the reservation. The non-Indian taxpayer is within the State and under state authority. The transaction is with an Indian on tribal land, therefore invoking tribal sovereignty. Federal sovereignty extends over both territories.[3] With sensitivity to all three sovereigns, the Court developed a nuanced but malleable and uncertain balancing-of-interests test to determine whether States may impose tax in these cases. The analysis calls for a "particularized inquiry into the

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[3] See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188 (1989) ("There are, therefore, three different governmental entities, each of which has taxing jurisdiction over all of the non-Indian [on-reservation] wells.")

nature of the state, federal, and tribal interests at stake . . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

In two other circumstances, however, where either state or tribal sovereignty predominates, the Court has adopted a "more categorical approach." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992). Companion cases in 1973 confirmed two bright-line tests as beacons of certainty in this difficult area. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) concerned off-reservation activity beyond the boundary of tribal sovereignty, where state interests prevail. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-149. The companion case of *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973), concerned a State's effort to tax Indian property or activity on the reservations, where tribal sovereignty interests are paramount.

> [A]sent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

Mescalero, 411 U.S. at 148. These bright-line rules have eased administration and reduced litigation.

The courts of appeals in *Richards* and the instant case ignored these clear standards. In both case the States had carefully drafted statutes imposing tax on the receipt of gasoline by the distributor. This means the tax is imposed high on the distribution chain where the taxpayers are fewest and the compliance burden easiest. It also generally means the tax is imposed on an off-reservation activity, invoking the bright-line rule of *Mescalero* and thereby furthering certainty.

In *Richards*, the Tenth Circuit did not question that tax was imposed on the distributor's receipt off reservation, but erroneously refused to apply the bright-line rule mandated by *Mescalero*. It used instead the result-compliant balancing-of-interests test from *White Mountain Apache Tribe*.

Here, the Ninth Circuit sidestepped both more certain rules. First it completely ignoring the plain language of the Idaho statutory scheme and the expressed intent of the Idaho Legislature imposing the Idaho fuels tax on the non-Indian distributor. Following that legislative design should have triggered the bright-line rules of *Mescalero* and *Arizona Dep't of Revenue v. Blaze Const. Co.*, 526 U.S. 32 (1999).[4]

[4] In *Blaze*, Arizona taxed a federal contractor's receipts from building roads for the federal government on an Indian reservation. Because neither party to the transaction was a tribal member, the Court rejected use of the balancing test of *White Mountain Apache Tribe*. It applied instead the more concrete "'narrow approach' to the scope of governmental tax immunity" adopted in *United States v. New Mexico*, 455 U.S. 720, 737 (1982), permitting taxation of the federal contractor unless Congress "take[s] responsibility for the decision, by so *expressly* providing." 526 U.S. at 36.

The Ninth Circuit then compounded its error by failing to heed explicit congressional authorization in the Hayden-Cartwright Act for States to impose gas tax on licensed traders on reservations, so persuasively argued by Idaho in its Petition for Certiorari.

In both cases, the courts of appeals ignored state law, thereby violating the sovereignty of States to craft their own tax systems and choose on whom to impose tax. By shifting where the States had placed the legal incidence of the tax, these decisions have undermined the certainty of this Court's "more categorical approach" in this sensitive area of law. Granting certiorari will once again afford the Court companion cases with which to restore definition to these bright-line rules and provide States and tribes with the certainty and predictability that fosters good relations between them.

ARGUMENT

THE NINTH CIRCUIT IN OVERRIDING IDAHO'S FUEL TAX SCHEME MISCONSTRUED ITS ROLE IN INTERPRETING STATE LAW THEREBY SERIOUSLY THREATENING STATE TAX SOVEREIGNTY.

Here, as to fuel later marketed to retailers of two of the tribes, the distributors received the gasoline off reservation as in *Richards*. With regard to the Coeur d'Alene Tribe, the distributor evidently imported gasoline from Washington directly onto the reservation in Idaho. Under the Idaho statute, the gasoline was received by the distributor when it crossed the border. Idaho Code §63-2403(4) (Michie Supp. 2004) (App. 70-71). Because the tax is imposed on the receipt by the distributor, not on a transaction with the tribe, the more certain rules allowing the State to tax absent Congress's "*expressly* providing" to the contrary would control.

A. The Ninth Circuit Disregarded Idaho's Tax Policy

In 2002 the Idaho Legislature amended its fuel tax expressly to place the legal incidence of the tax on gasoline distributors. The Ninth Circuit disregarded this Idaho tax policy under the guise of preserving to federal courts the authority to determine the legal "incidence of a state tax on a sovereign Indian nation." App. 11. While the Ninth Circuit's strained misinterpretation of the Idaho statute is worrisome, its misallocation of interpretative authority over state tax systems to federal law constitutes a serious contravention of state sovereignty and a pressing reason to grant Idaho's Petition for Certiorari.

Unquestionably, the 2002 Idaho Legislature amended its fuel tax to obtain a different result from the Idaho Supreme Court's decision in *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002) (fuel tax imposed on the retailer). The 2002 amendment explicitly set forth that purpose in an uncodified introductory section;[5] it imposed the tax on the receipt of fuel by the distributor;[6] it detailed the distribu-

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[5] Section 1 of 2002 Idaho Sess. Laws ch. 174 states:

> The Legislature intends by this act to modify the holding of the Idaho Supreme Court in the case of Goodman Oil Company of Lewiston, et al v. Idaho State Tax Commission, 136 Idaho 53, (June 8, 2001). Specifically, the Legislature intends, by this act, to expressly impose the legal incidence of motor fuels taxes upon the motor fuel distributor who receives (as "receipt" is defined in Section 63-2403, Idaho Code) the fuel.

[6] "A tax is hereby imposed upon the receipt of motor fuel in this state by any distributor receiving motor fuel

tor's responsibility for reporting and paying the tax;[7] and it placed legal liability on the distributor.[8] None of the provisions cited by the Ninth Circuit passes on the legal incidence of the tax or the tax liability or requires the distributor to collect tax from any other party.[9]

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upon which the tax imposed by this section has not previously been paid." § 63-2402(1), Idaho Code.

[7] "The excise tax imposed by section 63-2402, Idaho Code, is to be paid by the distributor, and measured by the total number of gallons of motor fuel received by him at the rate specified in section 63-2402, Idaho Code.. That tax, together with any penalty and/or interest due, shall be remitted with the monthly distributor's report required in section 63-2406, Idaho Code." § 63-2405, Idaho Code.

[8] "Any distributor required to pay the tax imposed by this chapter who fails to pay such tax shall be liable to the commission for the amount of tax not remitted plus any applicable penalty or interest. The commission may collect such amounts in the manner provided in section 63-2434, Idaho Code." § 63-2406(4), Idaho Code

[9] The Ninth Circuit cited four sections to conclude that the tax is not really imposed on the distributor: (1) a standard *bad debt deduction* (distributor should not have to pay tax when it is not paid for its gasoline); (2) a *security provision* (the portion of a distributor's receipts covering the amount of its tax liability is held "in trust" to give the State a secure position to recover taxes from an insolvent distributor); (3) an *anti-windfall provision* (a taxpayer who has passed on the economic burden of the tax must promise to pass on the economic benefit of a refund); and a *cost of compliance allowance* (to cover a business's costs to comply with its tax responsibilities). None of these provisions places liability for the tax or the obligation to report or pay it on anyone other than the distributor. They do consider the *economic burden* of passed-on tax and cost of compliance and make sensible administrative provision accordingly.

In sum, Idaho moved the legal incidence of the tax to the distributor in exactly the manner that this Court had instructed in *Chickasaw*. The Court there held that "[t]he initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax." 515 U.S. at 458. The Court recognized that integral to the legal incidence test is the ability of a State to specify where that legal incidence lies and even to move it to preserve state tax authority.

> And if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence

Id. at 460. The Court embraced the virtues of a bright-line, legal-incidence test—predictability, certainty and administrability—as preferred tax policy. It explained that "our focus on the tax's legal incidence accommodates the reality that tax administration requires predictability." *Id.* It cited with approbation the entreaty of 11 *amici* States with large Indian populations that a "legal incidence" test "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority." *Id.*

In spite of this Court's clear affirmation of the legal-incidence test in *Chickasaw* and Idaho's unambiguous placement of the legal incidence of the tax on the distributor in reliance on that rule, the Ninth Circuit repeatedly indicated that it found Idaho's tax policy decision unacceptable because it could end up imposing a burden on tribes.

> If the legislature could indirectly tax Indian nations merely by reciting *ipso facto* that the incidence of the tax was on another party, it would wholly undermine the Supreme Court's precedent that taxing Indians is impermissible absent clear *congressional* authorization. App. 12.
>
> We agree with the Tribes that if we determined legal incidence solely by looking at the legislature's stated intent, we would be permitting the state to name one party the taxpayer while requiring another to pay the tax, in the process avoiding tax immunities held by the second party. App 14.

"Permitting the state to name one party the taxpayer," however, is exactly what this Court held in *Chickasaw*. The key factor was not the Idaho Legislature's "merely reciting *ipso facto* that the incidence of the tax was on another party," but rather its *actually placing* the legal incidence on the distributor under the plain meaning of the statutory scheme.

The Ninth Circuit resisted acknowledging that States have that power for fear it would permit Idaho to "indirectly tax Indian nations" through the passing on of the economic burden of the tax

> If state legislatures could tax Indian tribes merely on the assertion that the incidence of the tax lies elsewhere, it would permit states indirectly to threaten the very existence of the Tribes. App. 14.

All this concern about "indirect" threats reveals that the Ninth Circuit was effectively disavowing the legal incidence test in favor of an economic burden test.

The legal-incidence standard, however, always entails the possibility that the economic burden will be passed on. In adopting that test, the Court fully anticipated that States would set state tax policy in such a way that the economic burden of a fuel tax could be imposed *indirectly* on tribal retailers and, ultimately, on their customers. The Court in *Chickasaw* had explicitly rejected Oklahoma's complaint "that the legal incidence of a tax 'has no relationship to economic realities.'" 515 U.S. at 459. It rejected an economic burdens test and pointed out the similar effect of its modern intergovernmental immunity doctrine under which States may impose a nondiscriminatory tax on federal contractors even though the entire economic burden of the tax is borne by the federal government. *Id.* at 460, n. 9. As this Court made amply clear in *United States v. New Mexico*, 455 U.S. 720 (1982), New Mexico's adoption of a *vendor* sales tax was controlling, permitting a tax that would have been barred had the State chosen a *vendee* sales tax.

B. The Application of an Unambiguous State Tax Law Does Not Raise a Federal Question.

The Ninth Circuit sought to avoid the result of Idaho's tax policy choice by claiming that interpretation of legal incidence was a federal question. By invoking federal law, it seemingly acknowledged *sub silentio* that following *state* law would place legal incidence where it did not want it. It sidestepped the "dispositive" issue of where Idaho had chosen to place the incidence of the fuel tax with this reconceptualization.

> Thus we conclude that, while the legislative declaration is "dispositive" as to what the

> legislature *intended*, removing the need to predict the legislative aim from reports and legislative statements, it cannot be viewed as entirely "dispositive" of the legal issue that the federal courts are charged with determining as to the incidence of the tax. App. 14 (emphasis in original).

It cited *Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954), for the proposition that "the question of incidence has been explicitly held by the United States Supreme Court to be one of federal law." App. 13. It sought support for this proposition by quoting from *Kern-Limerick* as follows:

> the Supreme Court rejected the idea that "a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign" because "[s]uch a conclusion . . . would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." App 13-14, quoting from *Kern-Limerick*, 347 U.S. at 121.

The Ninth Circuit misinterpreted the *Kern-Limerick* decision in several ways.

First, it failed to distinguish legislative action from court action. Of course a state *court* cannot "throw tax liability" where it chooses. *First Agricultural National Bank v. State Tax Comm'n*, 392 U.S. 339, 346-47 (1968). But the Idaho *legislature* can choose, as this Court held in *Chickasaw*, to "throw tax liability" on the distributor.

Second, the Ninth Circuit's concern about tax burden is misguided. States may arrange their tax system so as to impose tax on a party who may pass on the economic burden to a sovereign entity. This does not mean that the State has "arbitrarily eliminated an exempt sovereign." Allowing the economic burden to be borne by an exempt sovereign fully complies with federal law enunciated by this Court in *Chickasaw* and *United States v. New Mexico*.

Third, *Kern-Limerick* did not, in fact, hold that federal law governs legal incidence. A State legislature chooses where to place the legal incidence, as Alabama chose in *Kern-Limerick* to tax the purchaser. All *Kern Limerick* claimed was that federal law governed "facts and constructions upon which federal constitutional issues rest.[11]", 347 U.S. at 121 (footnote 11 discussed below). This refers to the facts of the case and the construction of the federal contract that determined who, in fact, the purchaser there was—the federal government not its agent. The cases cited in *Kern Limerick* in footnote 11 reinforce the conclusion that the federal questions are contractual terms and legal relationships; they do not stand for the proposition federal law may displace state authority to allocate legal incidence of a tax.[10]

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[10] In *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 83-4 (1946), the Court agreed that California's construction of its tax as "an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales" was binding. "But it is not determinative of the question whether the tax deprives a taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but its operation and effect."

In *United States v. Allegany Co.*, 322 U.S. 174, 183 (1944) the Court identified the federal issue:

Federal law also controls the "operation and effect" of the state law on constitutional protections. Thus, it determines here whether the State's imposition of tax on a particular party unlawfully impinges on federal or tribal sovereignty. With regard to state taxation affecting Indians as noted earlier, federal law has articulated three different tests covering three different circumstances. A state tax on a tribe or tribal member on the reservation will be struck down absent express permission from Congress. *McClanahan*. A state tax imposed on non-Indians for

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> The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.

In *Dyer v. Sims*, 341 U.S. 22, 29 (1951), federal law governed "the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the constitutional guaranty could not properly be enforced."

In *S.R.A. Inc. v. Minnesota*, 327 U.S. 558, 564 (1946), the Court stated "[i]n determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court."

And finally, in *Standard Oil Co. v. Johnson*, 316 U.S. 481, 483 (1942), the Court made clear "the relationship between post exchanges [the entity taxed under California law] and the government of the United States [was] a relationship which is controlled by federal law."

In each of these cases, the federal question was not interpreting state law to determine on which party to a transaction the legal incidence of the state tax fell, but the identity of that party and its relationship to the federal government under a federal contract or statutory scheme.

transactions on reservations with Indians will be determined by federal law under the interest-balancing test of *White Mountain Apache Tribe*. But a tax imposed off-reservation on Indian or non-Indian alike will be upheld "[a]bsent express federal law to the contrary." *Mescalero*, 411 U.S. at 148-149. These are matters of settled federal law and control whether a State's tax placed on a particular party is valid.

But federal law does not control on which particular party the State has chosen to place the tax. *Chickasaw* preserves to States that choice and further holds that such legal incidence, not "economic realities," provides the factual predicate for applying this settled federal law. Whether the "operation and effect" of Idaho's imposing tax on the receipt of gasoline by distributors violates some constitutional protection is indeed a matter of federal law and is determined by the rules established by this Court in *Mescalero* and *Blaze*, not *McClanahan*.

The Ninth Circuit's refusal under the guise of following federal law to acknowledge and accept this state tax policy choice is a serious incursion on state tax sovereignty. Furthermore, the Ninth Circuit's failure to follow federal law laid down by this Court's explicit doctrinal choice in *Chickasaw* to give precedence to state-identified legal incidence over "economic realities" will lead to uncertainty and increased litigation. This infringement of state sovereignty and refusal to follow clear recent precedent of this Court provide classic and compelling reasons to grant certiorari.

CONCLUSION

For the reasons stated, your *amicus* respectfully requests the Court to grant the petition for certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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December 21, 2004

(4)

No. 04-624

DEC 23 2004

In The Supreme Court of the United States

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE, SHOSHONE-BANNOCK TRIBES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF NORTH DAKOTA, ARIZONA, CALIFORNIA, CONNECTICUT, IOWA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, NEW MEXICO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, AND WYOMING IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE

This amicus curiae brief in support of the Certiorari Petition is respectfully submitted under Sup. Ct. R. 37(4).

SUMMARY OF ARGUMENT AND STATEMENT OF AMICI INTEREST

The amici states urge the Court to grant certiorari and review the decision below holding Idaho's motor fuel tax an impermissible tax on Indian tribes. The amici states, like Idaho, all rely on a motor fuel tax to fund highway construction and maintenance, and all have Indian lands within their borders. A limit on the amici's authority to apply the tax uniformly throughout the state will inhibit their ability to provide their citizens with a modern necessity – a comprehensive, safe transportation system.

State motor fuel taxes are dedicated to building and maintaining highways. The tax is thus unique in that it facilitates the very activity to which it relates – operating motor vehicles. The tax is an essential funding source that allows the amici to provide roads to all citizens, Indian and non-Indian, and to all areas of their states, reservation and non-reservation. The tax implements a state policy ensuring that all persons who benefit from the transportation infrastructure bear a fair share of its costs.

Congress recognized these state interests when it enacted section 10 of the Hayden-Cartwright Act. Act of June 16, 1936, § 10, ch. 582, 49 Stat. 1519, 1521 (codified as amended at 4 U.S.C. § 104). The statute's language meshes directly with the congressional purpose; that is, the Act subjects motor fuels sold on "reservations" to those

same taxes imposed elsewhere, thereby ensuring that all fuel sales in a state are taxed. By virtue of the Hayden-Cartwright Act, tax-free havens are eliminated.

The Ninth Circuit's decision disrupts a long-standing, even-handed method by which states fund their duty to provide a basic service. In doing so, the Ninth Circuit diluted an essential part of state taxing powers – the authority to define the legal incidence of state taxes. Not long ago this Court recognized such a state right, and did so in an Indian tax case. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995).

In *Chickasaw Nation*, the Court helped simplify Indian tax law by acknowledging that it is a state function to identify the incidence of a tax. *Id.* And this is just what the Idaho legislature did in 2002 with its tax. *Coeur D'Alene Tribe v. Hammond*, 384 F.3d 674, 680 (9th Cir. 2004). The majority of the Ninth Circuit panel, however, after declining to apply *Chickasaw Nation* and the state legislature's expressly stated intent, was then forced to comb the Idaho legislation and "germane" circumstances to locate the "true" incidence of the tax. *Id.* at 685.

By disregarding a state legislature's expressly stated intent, the majority below muddied an area of tax law the Supreme Court sought to clarify. The majority then went on to disregard a clearly written federal statute, Section 10 of the Hayden-Cartwright Act, which opens "reservations" to state motor fuel taxes. Rather than accept the plain meaning of "reservation," the majority found the word ambiguous.

The majority's analysis of the Hayden-Cartwright Act was predicated on applying one canon of construction used in Indian law to the exclusion of another "Indian canon."

To guide its interpretation, the majority relied on a canon providing that state taxes apply to tribes only if Congress allows in "'unmistakably clear'" terms. *Hammond*, 384 F.3d at 692 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). The majority applied the "unmistakably clear" test to the exclusion of the competing canon, the "general statute" rule. *Id.* The "general statute" rule provides that federal statutes of general applicability apply to Indians and to tribes just as they do to all the nation's citizens and areas. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 115-21 (1960). While the majority acknowledged the "general statute" rule, and while the Hayden-Cartwright Act is unquestionably a general statute, the majority declined to apply, or even discuss meaningfully, the rule.

In sum, the majority of the Ninth Circuit panel failed to follow this Court's instruction in *Chickasaw Nation*. In doing so, it transposed a bright-line test – states define the incidence of state taxes – into one that will have the judiciary searching dark corners for the "true" incidence of a state tax. The majority also failed to respect clear language in the Hayden-Cartwright Act, and in doing so, ignored this Court's jurisprudence on construing statutes of general application. Granting the Petition will give the Court the opportunity to reaffirm state authority over state taxes, to resolve the tension between competing canons of construction, and carry out Congress' manifest objective in adopting the Hayden-Cartwright Act.

Amici states have three primary interests in having the Petition granted.

First, amici states have a duty to provide their citizens with a well-developed and safe transportation

network. This can only be accomplished through tax revenue, an important source of which is the motor fuel tax. The tax is a fair one. It applies even-handedly to those that use the roads, and its benefits are spread even-handedly throughout the state. Indian lands and Indian citizens fully share the benefits of the motor fuel tax. Money raised by this tax is almost entirely devoted to constructing and maintaining highways. *See, e.g., Hammond*, 384 F.3d at 679 ("Substantially all proceeds from the [Idaho] motor fuel tax are used for highway construction and maintenance"); N.D. Const. Art. X, § 11; S.D. Codified Laws § 10-47B-148, 149. Amici have an intimate interest in protecting their financial ability to provide roads on and off reservations. This is particularly so where the motor fuel tax has been in place and unchallenged for many decades. U.S. Dep't of Transp., *America's Highways 1776-1976: A History of the Federal-Aid Program* 114 (1976) (tax generally in place by the 1920s).[1]

The majority's decision creates geographic, tax-free vacuums. The areas in which this will occur will be extensive. There are about 560 federally recognized tribes. 68 Fed. Reg. 68,180-01 (Dec. 5, 2003). Most tribes have reservations, which can contain huge amounts of land. For example, the Standing Rock Reservation, which straddles the North Dakota-South Dakota border, contains about 2.3 million acres. Mary Jane Schneider, *North Dakota Indians: An Introduction* 147 (1994). The Ft. Totten Reservation, now known as the Spirit Lake Reservation,

[1] North Dakota's motor fuel tax has been in place since 1926. I.M. June 30, 1926, 1927 N.D. Sess. Laws 547. South Dakota's has been in place since 1923. 1923 S.D. Sess. Laws ch. 225.

covers about 200,000 acres and the Ft. Berthold Reservation almost one million acres. *Id.* at 138, 142. Thus, the tax-free areas will be numerous and large. Amici states have an interest in limiting within their borders geographic tax havens. This is particularly so where amici have the duty to provide good roads to the tax-free areas.

And states do construct and maintain roads on reservations and other Indian lands. For example, there are three state highways on North Dakota's Spirit Lake Reservation, covering about 74 miles. There are six North Dakota state highways on the Ft. Berthold Reservation and four on the Standing Rock Reservation, covering about 147 and 108 miles. The state keeps these roads free of snow and ice in the winter and maintains them in the summer, work that, over the past ten years, has cost about $8.8 million. Further, 37% of North Dakota's motor fuel tax is distributed to counties and cities for local roads. N.D.C.C. § 54-27-19. Thus, the tax funds not only state highways but also secondary roads on reservations.

Second, amici states have a significant interest in controlling their tax systems. Indeed, this Court in *Chickasaw Nation* recognized that it is a state prerogative to identify the legal incidence of state taxes. Amici have an interest in maintaining this traditional power. This state function should not be replaced with a rule that allows the judiciary to engage in a substantially standardless search to locate the "true" incidence of a state tax. Such a rule is of uncertain application and will produce litigation.

Third, amici states have a keen interest in the proper interpretation and application of Indian canons of construction. It is not uncommon for states and tribes to disagree over the scope of their respective governmental

powers. And taxation has been one of the more common areas of dispute. *See, e.g., County of Yakima v. Confed. Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943).

State-tribal disputes often involve federal statutes. Such disputes are more likely avoided, and if not avoided, more readily resolved with clear rules of statutory construction, consistently applied by the judiciary. This Court has developed canons of construction applicable to Indian law issues, but the canons may not be entirely consistent and have not always been faithfully applied by lower courts. One canon provides that while Congress may allow states to tax tribes, its intent to do so must be "unmistakably clear." Another canon provides that when Congress enacts a statute generally applicable to all citizens and areas, the statute applies to tribes "in the absence of a clear expression to the contrary." *Tuscarora*, 362 U.S. at 120. In construing the Hayden-Cartwright Act, a statute of general applicability, the majority below applied the "unmistakably clear" rule to the exclusion of the "general statute" rule. Further, lower courts have carved numerous exceptions into the "general statute" rule. This Court should grant certiorari to address the tension between these two rules of statutory construction, reaffirm the "general statute" rule, and give the Hayden-Cartwright Act the application Congress intended with its use of the clear word "reservations."

ARGUMENT

I. In *Chickasaw Nation* the Supreme Court recognized a state's right to define the legal incidence of state taxes. The court below departed from *Chickasaw Nation* by rejecting the Idaho legislature's express identification of the legal incidence of the state motor fuel tax.

In *Chickasaw Nation*, the Court considered Oklahoma's taxation authority over the Chickasaw Nation and its members. At issue was Oklahoma's tax on motor vehicle fuel sold at tribal gas stations. 515 U.S. at 453. Because of Oklahoma's failure to timely raise the Hayden-Cartwright Act, the Court did not consider the Act. *Id.* at 456. But it did extensively discuss "legal incidence" issues.

The Court stated that the "frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of the tax." *Id.* at 458. If the incidence rests on non-Indians, there is then no categorical bar that prevents enforcing the tax. *Id.* at 459. The Oklahoma motor fuel tax statute did not expressly identify who bore the tax's legal incidence. *Id.* at 461. This absence of clarity was significant. It opened the door to judicial construction of the statute to identify the taxpayer. "In the absence of such dispositive [statutory] language, the question is one of 'fair interpretation of the taxing statute as written and applied.'" *Id.* (quoting *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (per curiam)). Upon interpreting the Oklahoma statute, the Court found that it imposed the tax on Indian retailers and, therefore, it was impermissible. *Id.* at 461-62.

The Court made three significant rulings in discussing the legal incidence of Oklahoma's motor fuel tax. In considering Idaho's motor fuel tax, the majority below disregarded each ruling.

First, the Supreme Court stated that the "[j]udicial focus" is on the legal incidence. *Id.* at 459. It then looked to the state statute to identify the legal incidence, but the statute was unclear. It was "the absence of such dispositive language" in the statute that opened to door to judicial construction. *Id.* at 461. The necessary implication is that had the statute clearly defined the legal incidence, its "dispositive language" would have settled the matter. Thus, the rule of *Chickasaw Nation* is that a state statute – even one involved in an Indian tax case – can contain dispositive language identifying the legal incidence of the tax. Idaho's statute contains such language. It expressly identifies non-Indian distributors as the taxpayer. *Hammond*, 384 F.3d at 680.

The Ninth Circuit majority, however, ruled that it had no obligation to defer to Idaho's express statement of intent, finding that when tribal interests are at issue, a different rule applies. *Id.* at 682-83. This analysis neglects the fact that tribal interests were at stake in *Chickasaw Nation*.[2]

In *Chickasaw Nation*, the Court rejected applying an "economic realities" test in favor of the "legal incidence"

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[2] The decision below is also directly contrary to *Pourier v. South Dakota*, 658 N.W.2d 395, 405, *vacated in part on rehearing on other grounds*, 674 N.W.2d 314 (S.D. 2004), *cert. denied*, ___ U.S. ___, 124 S.Ct. 2400, 158 L.Ed.2d 965 (2004).

test. It stated that if it were to apply an "economic realities" test it would force courts into a potentially complicated market analysis and create more litigation. *Id.* at 459-60. The "legal incidence" test is preferable because it provides "'a reasonably bright-line standard which . . . responds to the need for substantial certainty as to the permissible scope of state taxation authority.'" *Id.* at 460 (quoting State of South Dakota, et al. Amicus Curiae Brief at 2). *See also Crow Tribe v. Montana,* 650 F.2d 1104, 1111 (9th Cir. 1981) (identifying the legal incidence of a tax should not "extend to divining the legislature's 'true' economic intent").

Despite this guidance, the Ninth Circuit majority, after disregarding what should have been "dispositive language" in the Idaho statute, embarked on an "economic realities" investigation to find the "true" legal incidence. *Hammond,* 384 F.3d at 685-88. After identifying the "probable operational effects" of Idaho's tax, the majority found that the legal incidence fell on Indian retailers. *Id.* at 688. In sum, the majority rejected *Chickasaw Nation's* bright-line standard and applied one that will lead to uncertainty and litigation. The dissent accurately described the majority's approach as a "highly indeterminate analysis." *Id.* at 696 (Kleinfeld, J., dissenting).

Second, Chickasaw Nation provides clear guidance on what a state might do in the event a state tax is ruled unenforceable.

> And if a State is unable to enforce a tax because the legal incidence of the impost is on Indian or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence.

515 U.S. at 460. Idaho followed this advice. After the state Supreme Court invalidated the Idaho tax, Idaho amended its law to shift the tax's legal incidence to non-tribal distributors. *Hammond*, 384 F.3d at 680. But the majority below ruled that this Court really did not mean what it wrote in *Chickasaw Nation*, and that even if a state amends its statute with what should be dispositive language, a court can nonetheless search the statute, its "operational effects," and "germane" circumstances to itself locate and identify the legal incidence, that is, to substitute judicial construction for express legislative statement. *Id.* at 685, 688. Here, that judicial re-write of the Idaho legislature's unambiguous language involved engaging in such subjective exercises as evaluating whether a statutory amendment was "minimal" or "cosmetic." *Id.* at 684-85.

Three, the foundation of *Chickasaw Nation* is the Court's concern for certainty. It wanted a "categorical approach" to safeguard against litigation. 515 U.S. at 460. It wanted an approach that "accommodates the reality that tax administration requires predictability." *Id.* at 459-60. The same policy objective has been expressed in other Indian tax cases. *E.g., Arizona Dep't of Revenue v. Blaze Constr. Co*, 526 U.S. 32, 37 (1999) ("interest balancing . . . would only cloud the clear rule established . . . in *New Mexico*"); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 267-68 (1993) (a categorical approach to a property tax issue protects against litigation). The decision below upsets policy set in *Chickasaw Nation* and other Indian tax cases.

In sum, the decision below disregards much of *Chickasaw Nation*. In doing so, the majority seems influenced by an unwarranted view of states and their modern-day

relations with tribes. The majority stated that if it ruled any other way it would permit states "to threaten the very existence of the Tribes." *Hammond*, 384 F.3d at 684. Such an overblown concern may have led to a ruling that departs so strikingly from *Chickasaw Nation*.

II. In the Hayden-Cartwright Act Congress opened *all* federal "reservations" to state motor fuel taxation. The court below, however, found "reservations" ambiguous and, applying the wrong canon of construction, ruled that "reservations" does not include Indian reservations.

A. The Hayden-Cartwright Act is a statute of general applicability. Therefore, the Act is governed by the "general statute" rule, which provides that all citizens, including Indians, are subject to general statutes.

The majority below began its Hayden-Cartwright Act analysis by referring to the canon of construction providing that state taxes do not extend to tribes unless Congress so allows in "'unmistakably clear'" language *Hammond*, 384 F.3d at 692 (quoting *Montana v. Blackfeet*, 471 U.S. at 765). In applying this canon, the majority rejected another. *Id.* It failed to apply the "well settled" rule recognized by this Court in "many decisions," that is, the rule that a general statute purporting to apply to all persons includes Indians and their property interests. *Tuscarora*, 362 U.S. at 116.

Tuscarora concerned the Federal Power Act, which gave condemnation authority to federally-licensed entities. *Id.* at 115. Because the Act's condemnation provision did not specifically refer to Indian land, the Tuscaroras

asserted that the Act was inapplicable to land it owned in fee. *Id.* But there was no need for Congress to have specifically mentioned tribal land because the Act "constitutes a complete and comprehensive plan" for developing and improving navigation and electric power, giving every indication Congress intended to include lands owned by all persons, "including Indians." *Id.* at 118. Consequently, the Act's condemnation provision applied to tribal land. *Id.* The *Tuscarora* rule is that general statutes "apply to Indians as well as to all others in the absence of a *clear expression to the contrary*." *Id.* at 120 (emphasis added).

Thus, this Court has instructed that state taxes apply to Indians only if Congress allows in "unmistakably clear" terms. But it has also instructed that general federal statutes, even those providing for the extraordinary and sometimes harsh power of condemnation, apply to Indians unless Indians are excluded by a "clear expression" of such intent. The Hayden-Cartwright Act is a "general" law. It has general geographic and substantive applicability within the United States as to the subject at hand, that is, fuel sold on "reservations." It addresses national concerns – to provide employment and develop the nation's transportation network – in a national manner. *Tuscarora*'s "general statute" rule applies. *See also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) (Freedom of Information Act, a general law, applies to communications between a tribe and federal agency; implicitly applying *Tuscarora*). And because the Hayden-Cartwright Act lacks a "clear expression" to exclude Indians, it applies to Indians.

There are broader, but no less important questions concerning the reach of *Tuscarora* than just those presented by this case. Lower courts have been whittling

away at *Tuscarora*. "[N]umerous federal courts of appeal have rejected [*Tuscarora*] through subsequent action." *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F.Supp. 1131, 1135-36 (D. Okla. 2001). The Tenth Circuit limits *Tuscarora* to only federal statutes that affect "property rights." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (en banc) (National Labor Relations Act does not preclude a tribe from prohibiting union security agreements). Lower courts have found the Age Discrimination in Employment Act and the Fair Labor Standards Act overtime pay requirements inapplicable to tribal entities. *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493-96 (7th Cir. 1993); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993). Review of the decision below will afford this Court the opportunity to reiterate *Tuscarora* and clarify its scope.

B. The word "reservations" clearly includes Indian reservations, and, therefore, the Hayden-Cartwright Act applies to motor fuel sales on reservations.

Even if it were proper to apply the "unmistakably clear" rule and reject the "general statute" rule, the majority below still erred – as Judge Kleinfeld persuasively argued in dissent. The Hayden-Cartwright Act's application to Indian reservations is "unmistakably clear." By using the term "reservations" Congress expressed its intent to subject Indian reservation transactions to state motor fuel taxes.

An Indian reservation, after all, is nothing if it is not a "reservation," that is, an area of land set aside by the

United States for a particular federal purpose. As this Court has stated, "reservation" is a term that describes "*any* body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation." *United States v. Celestine*, 215 U.S. 278, 285 (1909) (emphasis added). The dissenting opinion relied on *Celestine* to conclude that the Act expressly authorizes the tax. *Hammond*, 384 F.3d at 696 (Kleinfeld, J., dissenting). It also relied on the dictionary and ordinarily understood meaning of "reservation." *Id.* at 696-97. And it relied on "settled administrative interpretation," *id.* at 697, that is, the long-unquestioned, executive branch interpretations of the Act. *Id.* at 695 n.28. Any doubt about Congress' intent to include Indian reservations is resolved by the Act's reference to "licensed trader," a term the dissent correctly understood to mean "one and only one thing," a person trading on Indian reservations. *Id.* at 697. Congress was unmistakably clear in opening Indian reservations to state motor fuel taxes.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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